

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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| UNITED STATES OF AMERICA, | : | 11-CR-00800(WFK) |
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| | : | |
| | : | |
| -against- | : | United States Courthouse |
| | : | Brooklyn, New York |
| | : | |
| | : | |
| SEMYON BUMAGIN, | : | Tuesday, June 30, 2015 |
| | : | 9:30 a.m. |
| Defendant. | : | |
| | : | |
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TRANSCRIPT OF CRIMINAL CAUSE FOR HEARING
BEFORE THE HONORABLE WILLIAM F. KUNTZ, II
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

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Proceedings recorded by mechanical stenography, transcript
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USA v Bumagin

2

1 (In open court.)

2 (Defendant enters courtroom.)

3 COURTROOM DEPUTY: Criminal cause for hearing,
4 Docket Number 11-CR-800, USA versus Bumagin. Counsel, please
5 state your appearances and spell your names for the court
6 reporter.

7 MR. TROWEL: Good morning, Your Honor. Kevin
8 Trowel, T-r-o-w-e-l, for the United States. I'm going to be
9 joined by AUSA James Gatta, G-a-t-t-a, who just went to grab a
10 bottle of water. And we're also joined by Marissa Gluck,
11 G-l-u-c-k, who's an intern in our office this summer, if
12 that's okay with Your Honor.

13 THE COURT: Absolutely. Where are you in school?

14 MS. GLUCK: I'm at Fordham, Your Honor.

15 THE COURT: Excellent. I went to Fordham Prep.
16 Couldn't get into the law school. You're welcome. Please be
17 seated.

18 THE DEFENDANT: Good morning.

19 THE COURT: Good morning.

20 MS. DOLAN: Zoe Dolan, D-o-l-a-n, for the defendant
21 Semyon Bumagin, who is present in custody. Good morning, Your
22 Honor.

23 THE COURT: Good morning. Good morning, Mr.
24 Bumagin. You may be seated as well. Do we have an
25 interpreter here today? Do we need an interpreter here today?

USA v Bumagin

3

1 THE DEFENDANT: I don't think so, Your Honor. I'm
2 pretty good with English.

3 THE COURT: All right. Ms. Dolan, does that work
4 for you or do we need an interpreter?

5 MS. DOLAN: I don't think that we need an
6 interpreter. I don't use one with Mr. Bumagin.

7 THE COURT: Okay. Thank you. All right, we are
8 here for a continuation of the competency hearing we have been
9 teeing up for quite some time. Are we ready to proceed?

10 MR. TROWEL: We are, Your Honor. The government is
11 happy to begin with the government calling Dr. Drob.

12 THE COURT: Is that acceptable to you, Ms. Dolan?

13 MS. DOLAN: The defense has an objection. The
14 government did not notice Dr. Drob as an expert.

15 THE COURT: It did not notice him as an expert, but
16 the Court appointed him as an expert and they indicated that
17 they wished to examine him. Would you like an opportunity to
18 take his deposition during the luncheon recess or to examine
19 him in some other fashion before he takes the stand today?

20 MS. DOLAN: No, I do not need to do that. I simply
21 object to the government calling him as a witness.

22 THE COURT: What's the basis of the objection? I'm
23 sorry, I'm not --

24 MS. DOLAN: The basis of the objection is that the
25 government didn't notice him as a witness and did not provide

USA v Bumagin

4

1 a summary of his testimony. I don't believe that he's
2 properly construed as a government witness.

3 THE COURT: What's your response?

4 MR. TROWEL: Just to clarify, Rule 614 concerns the
5 calling of an expert witness that the Court has appointed.
6 The rule indicates that the Court may call a witness on its
7 own or at a party's request, and each party is entitled to
8 cross-examine the witness.

9 And that stands to reason because here Your Honor
10 selected this individual to do an evaluation. The parties
11 both have the report that he created. And the Court, per Your
12 Honor's order of a few months ago, is having the hearing in
13 conformity with the statute, which says that we should have an
14 opportunity to ask him questions, essentially.

15 THE COURT: Yes, Ms. Dolan.

16 MS. DOLAN: I have a broader objection that I'll get
17 to in a moment, but the Court's essential holding in its April
18 10th decision was that even considering Dr. Drob's report,
19 based on the Court's observations of Mr. Bumagin in Court, the
20 Court finds Mr. Bumagin to be competent.

21 So I'll get to the matter of relevance in a moment.
22 But, again, this is a Court witness. The Court has not called
23 this witness. In fact, the Court has determined that even
24 considering the witness's potential testimony, that is to say
25 everything that's contained in the report, the Court has still

USA v Bumagin

5

1 drawn the conclusion that it has.

2 And so, therefore, first of all, because the Court
3 hasn't called this witness; and, second of all, even if the
4 Court did call this witness -- and I get to my relevancy
5 objection -- it wouldn't be relevant, because the Court has
6 already determined that even considering Dr. Drob's report
7 that the Court has still found Mr. Bumagin to be competent.

8 THE COURT: I'm willing to reconsider that. That's
9 one of the reasons we're here today. So I'm going to allow
10 both parties to examine the doctor and who knows where we'll
11 come out. We've had many twists and turns.

12 One thing that's not coming in is a report from
13 Butner, as we talked about before. It's not coming in
14 sideways. It's not coming in as a demonstrative. I can go
15 through the whole Dr. Seuss litany, but, Mr. Gatta, nice to
16 see you here today, but don't even try it. You're very
17 creative, but I'm very consistent. So just to be clear, that
18 report is out, stays out.

19 MR. TROWEL: Your Honor, just to clarify one issue,
20 Your Honor in an order ordered BOP to turn over documents to
21 Dr. Drob, and he, of course, considered those in his
22 evaluation.

23 THE COURT: Yes, I knew that was how you were going
24 to try to get it in. It's not coming in that way.

25 MR. TROWEL: No, Your Honor. We are not going to

USA v Bumagin

6

1 try to get the report in.

2 THE COURT: Good.

3 MR. TROWEL: There will be certain questions when
4 I'll ask him about what he reviewed in reaching his
5 conclusion, I'll discuss certain documents with him, but we
6 will at no point seek to admit the report or those documents,
7 but I think they're relevant insofar as they form part of the
8 basis of his opinion.

9 THE COURT: Well, let's see if they do, because he
10 obviously came out opposite the Butner doctors and found that
11 the defendant was, in fact, not competent. So I don't know
12 that we're -- we'll go question by question, but I just wanted
13 to forestall any anxiety either side might have had about
14 whether or not the Butner report is coming in. It's not.

15 MS. DOLAN: Just based on what Your Honor just said
16 about -- I'm not quite sure where we are in this phase of
17 things, whether this is some sort of reconsideration, but just
18 so the --

19 THE COURT: Consider it a reconsideration.

20 MS. DOLAN: Just so the record is clear, the defense
21 maintains all of its prior objections under the Second
22 Circuit's rule of reasonableness with respect to the duration
23 of these proceedings and everything else that the defense has
24 argued.

25 THE COURT: I must say the proceedings have been

DROB - DIRECT / TROWEL

7

1 lengthy. And if it's the Court's fault, the Court accepts
2 responsibility for that. If it's the fault of others, as the
3 Pope says, who am I to judge? All right.

4 MR. TROWEL: Thank you, Your Honor. So we'll begin
5 with Dr. Drob. I believe he's sitting out front.

6 (Witness sworn.)

7 THE COURT: Good morning, Doctor.

8 THE WITNESS: Good morning, Judge.

9 THE COURT: I'm the one who got you enmeshed in all
10 of this. I appreciate your being here today as a
11 Court-appointed expert. I'm going to ask you to spell your
12 name, first and last name for the reporter, and then counsel
13 will have an opportunity to question you with respect to your
14 report. So I will ask you to do that now.

15 THE WITNESS: My name is Sanford Drob, and it's
16 S-a-n-f-o-r-d, last name D-r-o-b.

17 THE COURT: Thank you. You may proceed, Counsel.

18 MR. TROWEL: Thank you, Your Honor.

19 **SANFORD DROB,**

20 Called by the Government, having been first duly sworn, was
21 examined and testified as follows:

22 DIRECT EXAMINATION

23 BY MR. TROWEL:

24 Q Good morning, Dr. Drob.

25 A Good morning.

DROB - DIRECT / TROWEL

8

1 Q You're a clinical psychologist; is that right?

2 A A clinical and forensic psychologist.

3 Q And you're licensed in the state of New York?

4 A That is correct.

5 THE COURT: Doctor, I'm going to ask you to move
6 that microphone -- it actually moves -- right in front of you.
7 Do you hear the difference?

8 THE WITNESS: Yes, I do.

9 THE COURT: Go ahead.

10 Q And you've previously qualified as an expert in both
11 clinical and forensic psychology?

12 A That is correct.

13 Q And you've qualified both in this district, in the
14 Eastern District, also in the Southern District, and then in a
15 number of state jurisdictions?

16 A Yes.

17 Q Your career primarily has been focused on forensic
18 psychology; is that right?

19 A Yes.

20 Q And in general, it's fair to say that forensic psychology
21 is the application of clinical psychology to issues that arise
22 in the judicial system?

23 A Yes.

24 Q Now, just generally by way of background, can you tell us
25 how you became involved in this case?

DROB - DIRECT / TROWEL

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1 A I believe that one of the clerks of the Court called me
2 and asked me if I would do a competency evaluation.

3 Q And there was a court order asking you to do that?

4 A That is correct.

5 Q And then pursuant to that order, did you actually conduct
6 an evaluation of the defendant?

7 A Yes.

8 Q I'm showing you --

9 MR. TROWEL: Your Honor, can I approach just to show
10 him his report?

11 THE COURT: Why don't you do it with the Elmo, if
12 you don't mind doing that, or have Mr. Jackson bring it
13 forward.

14 Q Showing you what's been marked as Government Exhibit 11.
15 Can you see that on your monitor up there?

16 A It was there momentarily, but it disappeared.

17 COURTROOM DEPUTY: Give it a couple of seconds, a
18 few seconds.

19 THE COURT: Can you see it now, Doctor?

20 THE WITNESS: Yes.

21 Q Is this the report that you created?

22 A Yes.

23 Q I'm just flipping through it here. You can see it goes
24 back to page 22. Is that the complete report?

25 A It appears to be, yes.

DROB - DIRECT / TROWEL

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1 MR. TROWEL: The government moves to admit
2 Government Exhibit 11 into evidence.

3 MS. DOLAN: No objection.

4 THE COURT: It's admitted.

5 (Government Exhibit 11 received in evidence.)

6 Q Now, in the course of your evaluation, did you meet with
7 the defendant personally?

8 A Yes.

9 Q How many times did you meet with him, as you recall?

10 A Three occasions.

11 Q And were those meetings on January 29th, February 11th
12 and March 20th of 2015?

13 A That is correct.

14 Q On each of those occasions, approximately how long did
15 you meet with the defendant?

16 A I'm being very approximate here, but probably a couple of
17 hours. Two to three hours.

18 Q On each occasion? Or just to clarify, you mean two to
19 three hours each time or two to three hours total?

20 A Well, I'm saying two to three hours each time, very
21 approximately.

22 Q I understand, thank you. And where did those meetings
23 take place?

24 A They took place at the Metropolitan Detention Center in
25 Brooklyn.

DROB - DIRECT / TROWEL

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1 Q Where within the facility? Was there a particular place
2 that you met with him?

3 A In one of the lawyer's rooms within the visiting room
4 right on the first floor.

5 Q Now, as part of your evaluation, did you conduct
6 interviews with the defendant during those meetings?

7 A Yes.

8 Q And did you also administer neuropsychological tests?

9 A I administered psychological tests and some tests that
10 would be called neuropsychological, yes.

11 Q Did you also collect data from some previous evaluations
12 conducted by BOP doctors?

13 A Yes. I collected and reviewed that data and reports.

14 Q And in general, those -- did you compare their data to
15 your data in the course of your evaluation?

16 A Yes.

17 THE COURT: You have to let the lawyer finish the
18 question before you answer yes, because he might sneak
19 something in there that you don't want to agree to, like you
20 shot JFK or something. So let him finish the question.

21 THE WITNESS: Fair enough.

22 THE COURT: Not this lawyer. Not that lawyer, but a
23 lawyer.

24 Q In general -- just to make sure the record is clear on
25 that, in general, you compared the results of the prior

DROB - DIRECT / TROWEL

12

1 doctors to your results in reaching your ultimate conclusion?

2 A That was one of the things that I did, yes.

3 Q As part of your evaluation?

4 A Yes.

5 Q Now, let's begin with the interviews of the defendant.

6 You first met with him on January 29th; is that right?

7 A Yes.

8 Q And then you met with him, the second time was about two
9 weeks later on February 11th?

10 A Yes.

11 Q At that second meeting, he recognized you; is that right?

12 A Yes.

13 Q And he recalled that you were a doctor, though he thought
14 you were a psychiatrist rather than a psychologist; is that
15 right?

16 A Well, as I recall, he recalled that I was a doctor at
17 times. At other times he asked me if I was a social worker,
18 and at other times he asked me who I represented. He told me
19 I was -- asked me if I was a lawyer at one point. But each
20 time I was able to reorient him and he understood what my role
21 was.

22 Q I'm referring specifically to February 11th, and I'm just
23 drawing your attention now to Government Exhibit 11. Right
24 here I'm pointing to the second full paragraph on the page.
25 On February 11th, he recognized you and he recalled that you

DROB - DIRECT / TROWEL

13

1 were a doctor, but he thought you were a psychiatrist rather
2 than a psychologist; is that correct?

3 A Yes. In reviewing my report, that is correct.

4 Q And then the next time you met with him was about five
5 weeks later on March 20th; right?

6 A That is correct.

7 Q And at that point, he recognized you again and he agreed
8 to be interviewed; is that right?

9 A That is correct.

10 Q You had never met the defendant before January 29;
11 correct?

12 A No.

13 Q So it's fair to say that who you were and your role and
14 all that information, that was all new to him as of January
15 29th; correct?

16 THE COURT: New to him or new to the doctor?

17 MR. TROWEL: New to the defendant as of January
18 29th.

19 A No, he didn't know me prior to the 29th.

20 Q But he retained some information at least about who you
21 were and he recognized you from meeting to meeting; is that
22 right?

23 A Yes.

24 Q Now, in the course of your interview, you asked the
25 defendant if he had experienced physical or sexual abuse;

DROB - DIRECT / TROWEL

14

1 right?

2 A Yes.

3 Q And he told you he had not?

4 A Correct.

5 Q But during that conversation, he volunteered that he had
6 been involved in several accidents; is that right?

7 A That is correct.

8 Q And he spontaneously offered that information to you?

9 A I may have asked him if he had any head injuries or
10 accidents, but he answered that he had.

11 Q And he told you that he has a history of heavy drug use,
12 including the use of crack cocaine and heroin?

13 A Correct.

14 Q And he also spontaneously offered that information to
15 you?

16 A Yes.

17 Q Now, he told you about one particular accident he had a
18 number of years ago when he was driving the wrong way on a
19 highway; is that right?

20 A Yes.

21 Q And in the course of describing that for you, he
22 remembered the make and model of the car he was driving; is
23 that right?

24 A I don't recall, but if it's in my report he did, yes.

25 Q Just to refresh your recollection, I'll again show you

DROB - DIRECT / TROWEL

15

1 what's been marked as Government Exhibit 11, showing you page
2 2, the last full -- the last paragraph on the page. I'm just
3 indicating here.

4 A Yes.

5 Q And so he told you he'd been driving a Lincoln Mark III
6 at the time; is that right?

7 A That is correct.

8 Q And he said following the accident that he was
9 unconscious for several days?

10 A Yes.

11 Q And then he recalled another accident in Germany when he
12 was young and he said he fell from a building when he was
13 running from the police; is that right?

14 A That is correct.

15 Q And he again told you that he injured his head when he
16 fell?

17 A Yes.

18 Q And then in the course of the interview, he also added
19 that his father had Alzheimer's disease; is that right?

20 A Yes.

21 Q In the course of your interview, did he spontaneously
22 offer those stories to you?

23 A Well, in the case of the stories about the accidents,
24 they were in response to questions. I believe that he
25 spontaneously told me that his father had Alzheimer's disease

DROB - DIRECT / TROWEL

16

1 several times in the course of the various interviews. He
2 made a joke to that effect.

3 Q But in other words, just to clarify, you didn't have any
4 preexisting knowledge of --

5 MS. DOLAN: Objection to interrupting the witness in
6 the middle --

7 THE COURT: Had you finished your answer, Doctor?
8 Why don't we read the question and answer back to the
9 interruption and the doctor can complete the answer.

10 (Question and answer read.)

11 THE COURT: Had you completed your answer, Doctor?

12 THE WITNESS: I suppose. I think I was going to say
13 specifically what he said. He indicated to me that his
14 father, instead of leaving him a million dollars, left him
15 with Alzheimer's disease.

16 Q Thank you. I apologize for interrupting. What I meant
17 to ask in the course of that question was that you didn't have
18 any preexisting knowledge of those accidents, for example; is
19 that right?

20 A There was some mention of I believe one accident in the
21 previous reports. So I guess I was aware of that, but not in
22 the details that he told me, no.

23 Q So you didn't ask him, for example, tell me about the
24 accident in Germany?

25 A No.

DROB - DIRECT / TROWEL

17

1 Q He just volunteered information about an accident in
2 Germany that he recalled?

3 A That is correct.

4 Q Now, it's fair to say in general that heavy drug use
5 might have an effect on one's mental capacity?

6 A Yes.

7 Q And it's fair to say also that head injuries might have
8 an effect on one's mental capacity?

9 A Yes.

10 Q And is it also fair to say that a family history of
11 Alzheimer's disease might be relevant to one's mental
12 capacity?

13 A Yes.

14 Q And then, as you noted, in the course of the interview,
15 he on a number of occasions spontaneously told you that he had
16 issues, quote, in the memory department; right?

17 A That is correct.

18 Q Is it fair to say that during the interviews he
19 spontaneously and voluntarily provided you with information
20 that he believed was relevant to your assessment of his
21 competency?

22 A Well, the question of spontaneous is something that I
23 think I need to clarify. In the course of my interviews, I'm
24 asking him questions that are relevant to any history that
25 might be important with regard to evaluating memory. So I

DROB - DIRECT / TROWEL

18

1 asked him if he had accidents or head traumas. I asked him if
2 he had any history of substance abuse. Those responses that
3 he gave me were in response to my questions.

4 In the case of Alzheimer's disease, before I had an
5 opportunity to perhaps ask him if there was any history of
6 Alzheimer's -- any history of, you know, of mental or nervous
7 trouble in his family, he spontaneously, as you put it,
8 offered that his father had Alzheimer's and had transmitted it
9 to him.

10 Q But in response to your general questions about head
11 injuries or substance abuse, he provided you with narrative
12 information that was responsive to your question; is that
13 correct?

14 A That is correct.

15 Q And you didn't lead him on those questions, that was
16 information that he was providing to you from memory?

17 A That is correct.

18 Q Now, he also -- you've mentioned that you reviewed the
19 prior reports in the case; right?

20 A Yes.

21 Q And that includes a report created by Dr. Rivera-Mindt?

22 A You know, I'm not certain if I saw Dr. Mindt's report. I
23 saw summaries of that report in the report by Dr. Grant, but
24 I'm not certain that I reviewed Dr. Mindt's report.

25 Q Insofar as her report was discussed in other reports, you

DROB - DIRECT / TROWEL

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1 refer to her tests and you refer to some of her conclusions;
2 is that right?

3 A That is correct.

4 Q And you also reviewed a report created by Dr. Brauman at
5 MCC?

6 A Correct.

7 Q And then you reviewed a report created by Dr. Grant at
8 Butner?

9 A Yes.

10 Q And in each of those reports, there was a discussion of
11 his -- the defendant's drug use; correct?

12 A Yes.

13 Q He told those doctors about his drug use?

14 A Yes.

15 Q And in each of those reports, there was a discussion of
16 the defendant's self-report of Alzheimer's in his family;
17 correct?

18 A I believe so, yes.

19 Q And then he told Dr. Rivera-Mindt and Dr. Brauman about
20 head injuries also; is that right?

21 A I'm not sure if he told them the precise ones that he
22 told me, but he did speak about them, yes.

23 Q Just without getting into which ones, in general, he told
24 Dr. Rivera-Mindt and Dr. Brauman about head injuries that he
25 had suffered?

DROB - DIRECT / TROWEL

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1 A That is correct.

2 Q Now, you spoke to the defendant's sister by phone; is
3 that correct?

4 A Yes.

5 Q And you spoke to his son by phone also; is that right?

6 A That is correct.

7 Q And then you reviewed some transcripts of phone calls
8 from 2011 and 2012 that -- transcripts of phone calls the
9 defendant made from jail; is that right?

10 A Yes, I did, that were provided to me, yes.

11 Q And in those transcripts, you concluded that, quote:
12 It's clear that he, the defendant, believes that by
13 demonstrating he has cognitive deficits he will gain an
14 advantage in this case.

15 A Yes.

16 Q That was a conclusion you drew from those calls?

17 A That's my conclusion, yes.

18 Q Now, in those calls it's fair to say, isn't it, that the
19 defendant was encouraging his family to provide information
20 that he believed would further that goal?

21 A Yes.

22 Q Now, it's fair to say in general, too, isn't it, that his
23 sister and his son are -- they're interested parties; is that
24 right?

25 MS. DOLAN: Objection.

DROB - DIRECT / TROWEL

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1 THE COURT: Sustained.

2 Q They're not unbiased sources?

3 MS. DOLAN: Objection.

4 THE COURT: Sustained.

5 Q In your experience -- in your experience as a forensic
6 psychologist, you collect collateral information about your
7 patients; is that right?

8 A Yes.

9 Q And one source of collateral information oftentimes is to
10 interview family members or others who have some interaction
11 with your patient; right?

12 A Yes. The word "patient" I would change to the person I'm
13 examining, the examinee. I'm not treating them. But yes.

14 Q So you will speak to friends or family, coworkers, things
15 of that sort?

16 A That is correct.

17 Q And that information --

18 THE COURT: You have to let him finish or the court
19 reporter is going to have trouble. Go ahead.

20 Q And that information is relevant to your ultimate
21 determination, because those sources can tell you things that
22 you can't personally observe; correct?

23 A Relevant, yes.

24 MS. DOLAN: Your Honor, I need to request two
25 seconds.

DROB - DIRECT / TROWEL

22

1 THE COURT: Of course.

2 (Pause.)

3 MS. DOLAN: Thank you.

4 Q So those collateral -- those interviews with friends,
5 family or coworkers, those can be relevant; correct?

6 A Yes.

7 Q When you take those interviews, do you assess the
8 perspective of that source in determining how much weight to
9 give their opinion?

10 A Yes.

11 Q So, in general, what kind of weight or how do you adjust
12 for things that family members tell you?

13 A Well, I think it's different in each case. But in
14 general, a family member would be sympathetic to whatever goal
15 the client has, in general. That's not always the case, but
16 in general it is.

17 And so, because of that sympathy, I would maintain I
18 guess what I would call a healthy skepticism about things that
19 they might say and not necessarily distrust them, because my
20 experience is, in general, family members don't collude with
21 defendants' efforts to lie to me, but sometimes they might and
22 so I have some skepticism towards them.

23 Q In this case, you also spoke to defense counsel; is that
24 right?

25 A That is correct.

DROB - DIRECT / TROWEL

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1 Q In general, what weight do you give to defense counsel
2 when you speak to them?

3 A I give it significant weight. Generally, I'm less
4 skeptical certainly towards defense counsel's reports about
5 their interactions with a client than I would be with regard
6 to other people.

7 Q But it's fair to say that counsel, defense counsel is not
8 an objective observer; right?

9 MS. DOLAN: I'm going to object to that and I'm also
10 going to object to this line of questioning.

11 THE COURT: Well, what's the purpose of asking this
12 doctor about the roles of prosecutors and defense counsel? I
13 mean really?

14 MR. TROWEL: The point, Your Honor, is that there
15 are a number of collateral sources that the doctor relied upon
16 reasonably and I think it's important to note that, in
17 general --

18 THE COURT: I have no problem with you asking the
19 doctor if he spoke with you, if he spoke with defense counsel,
20 if he spoke with family members. But let's not get into the
21 characterizations. I think that's where Ms. Dolan correctly
22 objects, and I'm going to sustain the objection.

23 So you can establish with whom he spoke and why
24 don't we move it along. If he hadn't spoken with the various
25 lawyers, I would have been surprised and disappointed in my

DROB - DIRECT / TROWEL

24

1 court-appointed expert. Let's move it along, all right?

2 MR. TROWEL: Thank you.

3 THE COURT: You're welcome.

4 Q So you said you spoke to defense counsel?

5 A Correct.

6 Q And then you spoke to myself and my colleague in the U.S.
7 Attorney's Office as well; right?

8 A That is correct.

9 Q Did you speak to anyone at MDC about their interaction
10 with the defendant?

11 A No.

12 Q And did you speak to anyone at Butner, I'm not referring
13 to doctors, but staff or others who may have interacted with
14 him there?

15 A I think I had -- no, not with anyone other than the
16 doctors.

17 Q Now, since 2012, the defendant has been evaluated several
18 times, that's fair to say, right?

19 A That is correct.

20 Q And for each of those evaluations he was given
21 performance validity tests?

22 A That is correct.

23 Q In general, validity tests are administered to help the
24 testing doctor determine whether the subject is giving his
25 full effort on the test; is that right?

DROB - DIRECT / TROWEL

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1 A That is correct.

2 Q And in general, if a person fails a validity test, at a
3 minimum, the evaluator then has a reason to doubt that the
4 results in the test represent that subject's best efforts. Is
5 that fair to say?

6 A Well, he or she would have reason to potentially doubt
7 that, and presumably it might also extend towards other tests
8 that were given at the same time.

9 Q In general, when a subject fails a validity test, the
10 higher scores in the testing battery represent the floor of
11 that person's ability; is that right?

12 A I'm not sure I understand the question.

13 Q So, to give you an example, if a subject gives poor
14 effort and you've concluded that he's given poor effort but he
15 scores in the average range on a particular test, that score
16 represents the floor of his ability, not the ceiling; correct?

17 A That is correct.

18 Q And if an individual or subject's efforts are
19 inconsistent or poor, then his true abilities may be higher
20 than is represented in the tests that you've given?

21 A That is correct.

22 Q And they may even be significantly higher?

23 A They may be.

24 Q In other words, and I think maybe you just said this, but
25 the -- under those circumstances, the examiner can't tell what

DROB - DIRECT / TROWEL

26

1 the ceiling is for that subject's efforts or abilities --
2 withdrawn.

3 Under those circumstances, the examiner can't tell
4 what the ceiling is for that subject's abilities?

5 A Yes, I would agree with that.

6 Q This defendant failed validity tests that were
7 administered by Dr. Rivera-Mindt in 2012; right?

8 A Well, he did poorly on some validity tests and scored in
9 the normal range on others. So over the course of these
10 examinations, yes, he did poorly on some that were
11 administered by her. I'd have to check which ones, but yes.

12 Q But when you say "did poorly," isn't it true that these
13 tests have cutoffs?

14 A They have cutoffs which suggest potential invalidity, and
15 he scored below the cutoff on some tests.

16 Q And he scored below the cutoff on some tests administered
17 by Dr. Rivera-Mindt in 2012?

18 A Correct.

19 Q He scored below the cutoff on some validity tests
20 administered by Dr. Brauman in 2012?

21 A Well, I believe Dr. Brauman only -- as I recall, only
22 administered one test, but he scored below the cutoff on that
23 one, yes.

24 Q And then he failed validity tests administered by
25 Dr. Pennuto at Butner in 2013?

DROB - DIRECT / TROWEL

27

1 A Well, again, he scored in a range, for example, on the
2 validity indicator profile, which would suggest that he might
3 not have been putting forth his full effort but put some
4 effort into the test.

5 On some of the other tests, like the Logical Memory
6 Test of the Wechsler Memory Scale, yes, he failed it. And
7 then there were other tests that were administered where he
8 scored perfectly within the normal range. So I think that
9 that's a nuanced presentation here that to simply say he
10 failed tests doesn't quite get at.

11 Q I understand. I'm asking I think a simpler question,
12 though. Dr. Pennuto administered a battery of tests; correct?

13 A I'm sorry, Doctor?

14 Q Dr. Pennuto at Butner.

15 A Okay, yes.

16 Q She administered a battery of tests?

17 A That is correct.

18 Q Among those tests there were validity tests?

19 A That is correct.

20 Q And on some validity tests he scored below the cutoff?

21 A That is correct.

22 Q And then you also administered validity tests?

23 A That is correct.

24 Q And he scored below the cutoff with you as well?

25 A Well, he scored below the cutoff on the TOMM.

DROB - DIRECT / TROWEL

28

1 MS. DOLAN: Objection.

2 THE COURT: What's the objection?

3 MS. DOLAN: I'm going to object to the question and
4 the testimony about Dr. Pennuto and move to strike. That
5 report is not in evidence and it's been precluded. So that's
6 not relevant.

7 THE COURT: The objection is sustained.

8 MR. TROWEL: Your Honor, the reason I asked about
9 this is because it was something that he considered, Dr. Drob
10 considered in the course of his evaluation, number one.

11 And number two, Your Honor will recall that even
12 though Your Honor did not bring the report in, which we're not
13 trying to do now, Dr. Pennuto, in fact, testified about her
14 tests and the results before Your Honor last July.

15 THE COURT: And obviously, what you're doing is
16 going over well-plowed ground that we heard from the actual
17 doctor. There's no need to ask this doctor about another
18 doctor's conclusions when I allowed you to question that
19 doctor about the conclusions even though the report didn't
20 come in. So there's no need to go through it.

21 MR. TROWEL: He's already explained to Your Honor
22 that he -- that some of this informed his decision. That's
23 the only reason I'm asking. I'm happy to move on, Your Honor.

24 THE COURT: Good. So do it.

25 Q Now, you -- as we discussed, you obtained information

DROB - DIRECT / TROWEL

29

1 about Dr. Rivera-Mindt's tests through the reports that you
2 considered; correct?

3 A Yes.

4 Q Dr. Rivera-Mindt administered the Rey 15 Memory Test;
5 correct?

6 A I believe so, yes.

7 Q And the Rey 15 test has 15 items laid out in very simple
8 patterns; is that right?

9 A Yes.

10 Q The defendant is shown those items, he's asked to study
11 them; right?

12 A Yes.

13 Q And then the items are taken away and he's asked to
14 recall what the printout or what the test says; right?

15 A That is correct.

16 Q The patterns are very simple; is that fair to say?

17 A Well, they're repetitive patterns, so they're grouped in
18 a way that makes them relatively easy to recall.

19 Q And they're things like A, B, C and one, two, three?

20 A Yes.

21 Q Now, in Dr. Rivera-Mindt's testing, he got just three of
22 15 of those correct; is that correct?

23 A That is correct.

24 Q And that's a very, very low score?

25 A Yes.

DROB - DIRECT / TROWEL

30

1 Q Dr. Rivera-Mindt also administered the CVLT-II
2 Forced-Choice Recognition Trial; is that right?

3 A Yes.

4 Q And on that test, the subject is required to choose one
5 of two --

6 MS. DOLAN: I'm going to -- pardon me.

7 THE COURT: Go ahead.

8 MS. DOLAN: I didn't mean to interrupt Mr. Trowel.

9 THE COURT: That's all right.

10 MS. DOLAN: I'm going to object to all of this on
11 Dr. Rivera-Mindt. Dr. Rivera-Mindt -- Dr. Drob has testified
12 he didn't review her report. Essentially, what's happening
13 here is the government is trying to challenge
14 Dr. Rivera-Mindt's evaluation and her findings and
15 conclusions. Those are not at issue in this hearing.

16 THE COURT: I'm going to sustain the objection. The
17 purpose of examining this doctor is to ask this doctor what he
18 determined, how he determined it, what tests he gave. So why
19 don't you limit your questions to what this doctor did with
20 respect to the defendant and we can really move this along.

21 I've heard extensive testimony from the other
22 doctors in this case and asking this doctor to regurgitate
23 what those doctors did is not really advancing the ball. So
24 why don't you question this doctor about what he did, when he
25 did it. One of the reasons he's here is the staleness of the

DROB - DIRECT / TROWEL

31

1 earlier reports in terms of time. And we can move on.

2 So, with that friendly suggestion, the objection is
3 sustained. Let's ask this doctor about what he did, when he
4 did it, and then he can get back to his life. Go ahead.

5 MR. TROWEL: Your Honor, I understand Your Honor's
6 ruling.

7 THE COURT: It's pretty clear.

8 MR. TROWEL: Just to preserve the record --

9 THE COURT: Your record is very well-preserved.

10 MR. TROWEL: I'm not sure it is on this issue and I
11 just want to --

12 THE COURT: Okay, go right ahead. I'm reconsidering
13 my earlier decision, but go right ahead and make your record.

14 MR. TROWEL: I appreciate that, Your Honor.

15 THE COURT: I'm glad you appreciate it.

16 MR. TROWEL: The only reason I'm asking these
17 questions is because these are things that Dr. Drob referred
18 to in his report. They formed, along with the testing and the
19 interviews --

20 THE COURT: All right. Dr. Drob, what did you do
21 and when did you do it with respect to this defendant? What
22 examinations did you conduct? Please take us through your
23 report and what you did and when you did it.

24 THE WITNESS: Sure. I examined the defendant on
25 January 29th, February 11th and March 20th. I conducted

DROB - DIRECT / TROWEL

32

1 interviews and mental status examinations.

2 THE COURT: Stop right there. Tell us about the
3 interviews and then tell us about the mental status
4 examinations that you conducted.

5 THE WITNESS: With your permission, Your Honor, I'll
6 refresh my memory.

7 THE COURT: Please. It's in evidence and it was
8 offered by the government. I'm sure they have no problem with
9 that.

10 MR. TROWEL: No objection.

11 THE COURT: I'm glad. It would have been overruled.
12 Go ahead.

13 THE WITNESS: He told me that he was born and he
14 gave me his birth date of August 6, 1947 in Minsk, Belarus.
15 He told me the names of his parents.

16 THE COURT: By "he," you mean the defendant?

17 THE WITNESS: The defendant, yes.

18 THE COURT: Go ahead.

19 THE WITNESS: He said he couldn't recall. I asked
20 him when or how his parents died and that's when he first told
21 me that he had problems in what he described as the memory
22 department.

23 He then indicated to me by way of explanation as to
24 why he might not recall all of these biographical details that
25 his father had Alzheimer's disease and he believed that he had

DROB - DIRECT / TROWEL

33

1 inherited it from him.

2 He told me that his father died at some point when
3 he, the defendant, had been incarcerated, and that his family
4 had moved to the United States at some point but he could not
5 recall when. He told me that he had a sister who was 11 years
6 younger than him who lived in Brooklyn. He told me that he
7 grew up in the Soviet -- former Soviet Union, that he was
8 treated well as a child and that he came from a nice Jewish
9 family.

10 I remember early on in the conversation he asked me
11 in Yiddish if I spoke Yiddish and I said to him back in
12 Yiddish a little bit. He at times then answered some of my
13 questions in Yiddish, but I told him that I didn't understand
14 it well and refocused him.

15 He said that his father had worked for the Red Cross
16 and that his mother was a secretary for the KGB. He told me
17 that he had been divorced from his second wife and he told me
18 he had two children. He named the children. He complained
19 that they didn't visit him. He said that one of the children,
20 that his daughter was a doctor and he thought she might be a
21 psychologist who works with retarded children. He said that
22 his son Martin is a nice son who's about 30 and who had been a
23 sniper in the U.S. military and had been in Iraq for two to
24 three years. He told me that he had a grandson that he
25 believed was about a year and a half old.

SHERRY BRYANT, RMR, CRR

DROB - DIRECT / TROWEL

34

1 He denied any history of physical or sexual abuse in
2 his life. He -- then when asked about accidents, he told me
3 the story that we went through already about him crashing his
4 Lincoln Mark III by driving the opposite direction in the
5 highway. He also reported the accident that occurred in
6 Germany when he was a very young man and injured his head when
7 he jumped from the third floor of the building when police
8 were chasing him in order to arrest him.

9 He was -- I would characterize his demeanor during
10 the interview as easygoing, friendly, and with efforts to make
11 humor. He made jokes. He told me that he had been his
12 grandmother's favorite child and told me stories about things
13 that she told him that he didn't do, which he feels he's now
14 paying for, but all with a kind of sense of humor.

15 He told me that he had graduated from high school in
16 Minsk and attended technical college and said that he studied
17 IBM, quote, unquote, there.

18 MR. TROWEL: Your Honor, could I ask a question
19 about this portion of the interview?

20 THE COURT: Well, let's let him go through the
21 interview and then what he did, and then if there are
22 questions we can go back. So why don't you continue in this
23 narrative form.

24 THE WITNESS: Am I giving too much detail?

25 THE COURT: No, you're not. This is what you should

DROB - DIRECT / TROWEL

35

1 have been being asked about and this is what I want to hear
2 from you, the expert. Go ahead.

3 THE WITNESS: He indicated that he didn't recall his
4 employment history. He said that he thought he was doing IBM
5 when he was in the Soviet Union. He said that he later drove
6 a taxicab. And one reason he did this was in order to learn
7 English. And he told me with a certain pride that he spoke
8 several languages, including Italian, Spanish, Polish,
9 Ukrainian, Russian and English.

10 He told me, when asked, that he had been
11 incarcerated in several countries, Germany, Italy and Denmark
12 in the past. And he said that he was a diamond dealer and he
13 acknowledged to me that in his early years he had been, as he
14 put it, a con artist who would switch diamonds and also a
15 moneyman, to explain his -- by way of explanation of his
16 incarcerations. But he said that he had never engaged in any
17 acts of violence.

18 When asked about his drinking and drug history, he
19 told me he had been a social drinker, but that he wasn't an
20 alcoholic, but that he said that he also smoked marijuana
21 daily in the past and had used crack cocaine. He said he
22 didn't remember the frequency of his crack use, but he said
23 that he used to use heroin to calm him down when he smoked
24 crack. He also told me that he enjoyed gambling and, as he
25 put it, good exotic food.

SHERRY BRYANT, RMR, CRR

DROB - DIRECT / TROWEL

36

1 With regard to his medical problems, he said that
2 they are very bad, that he believes he has bad medical
3 problems. He told me that he had been diagnosed with liver
4 cancer but had received no treatments for it. He also told me
5 that he had Alzheimer's disease and that he is constantly
6 losing his personal possessions, including his sneakers,
7 clothing, cup and radio. When I asked him about the liver
8 cancer, he said that a second doctor told him that he was
9 cancer-free, and he added maybe God loves me with regard to
10 that.

11 When I asked him about his psychiatric history, as I
12 recall, he initially said that he didn't have any, but then
13 reported that at one point when he was a young man he had
14 become suicidal after losing a girlfriend but that he has no
15 suicidal thoughts now. I think he later told me that his
16 father had gone into a psychiatric hospital at that point. He
17 repeated at that point that he's been divorced, and he said
18 that he felt that God was punishing him for disobeying his
19 grandmother and marrying outside of the faith.

20 Now, with respect to his current charges, he told me
21 more things than were in my report. They were spontaneous
22 utterances about his case, but which I did not include in the
23 report because they weren't things that I had asked him about
24 and I didn't, particularly after speaking with defense counsel
25 and hearing her concerns about it, I didn't put the details.

SHERRY BRYANT, RMR, CRR

DROB - DIRECT / TROWEL

37

1 But he did tell me a version or his version of the
2 charges. He indicated to me that he had been charged, as I
3 put it in my report, like a mafia boss with organized crime.
4 He says, I don't even know what they have charged me with, but
5 that the state was withholding the prosecution because of his
6 memory problems.

7 And then he clarified and said that he was arrested
8 for gun possession and, again, without my inquiring, he
9 provided an account of the events that led to his arrest which
10 he regarded as exculpatory. He said that the kinds of things
11 he's been charged with are completely inconsistent with his
12 prior behavior. He said that in the past he had smuggled
13 diamonds and was a con but he was, as he put it, not a mafia
14 boss or not somebody who he -- he also said not somebody who
15 committed violent acts.

16 He told me that he gets along well with his lawyer,
17 Ms. Dolan, who he described as the public defender, and he
18 expressed the desire that she should have his case dismissed.
19 He again repeated that he had Alzheimer's disease and couldn't
20 be held responsible for his case. At that point is one of the
21 times when he asked me if I was a social worker. I told him
22 that I was a psychologist. And he also repeated several times
23 that he has Alzheimer's disease.

24 I then proceeded to ask him about the key figures in
25 the courtroom or in a legal case. He told me that an

DROB - DIRECT / TROWEL

38

1 attorney's role is to defend me, that the prosecutor's role is
2 to, quote, "prove that I did the crime," that the judge's role
3 is, quote, "to protect me." And when prompted for more, he
4 said: "Find out if I am guilty or not guilty." I asked him
5 what a jury was and he said: "Oh, they're also to find out if
6 I am guilty or not guilty." He told me that a witness's role
7 is to, quote, "to prove what I am guilty, lying or not lying,
8 supposed to tell the truth." That should be an end quote in
9 my report. That's missing.

10 He expanded upon his answers in each case to then
11 talk about witnesses and details of the case, but it remained
12 clear to me that he understood the concepts that were
13 involved. When I asked him if he understood what a plea
14 bargain was and to describe it, he says -- he spontaneously
15 said that the judge had informed him that he would not be
16 prosecuted because of his Alzheimer's disease, but then said
17 nobody offered me something, which suggested to me that he
18 understood what a plea offer would be or a plea bargain is.

19 It's clear from what he volunteered that he
20 understood the meaning of plea bargain. I asked him to
21 explain the concept of perjury, and he said to, quote,
22 "fixity," using his own neologistic word, "to fixity documents
23 or phony papers." But then when I told him, well, it could be
24 more than that, it could be any lying to the Court, he quickly
25 agreed with me and seemed to understand.

SHERRY BRYANT, RMR, CRR

DROB - DIRECT / TROWEL

39

1 When I asked him what evidence was he said, quote,
2 "proving if you're lying or telling the truth," and then again
3 went on to speak about this case. As I indicated in my
4 report, he evidenced a not perfect but fairly good knowledge
5 of these court figures.

6 So my mental status exam, he had what I would
7 describe as a normal level of arousal. He was there in the
8 room and he was clearly able to engage in conversation. He
9 had some difficulty, at least on its face, being oriented to
10 time, place and person. He couldn't recall the year or said
11 he couldn't recall the year and he said two thousand, two ten,
12 eleven twelve. And when I asked him who the mayor of New York
13 was, he said Koch. He was aware of the purpose of the
14 examination but, as I mentioned earlier, he had to be reminded
15 periodically about my profession.

16 He spoke with a Russian accent and at times
17 mispronounced or used incorrect words. My conclusion, though,
18 was that his English language receptive and expressive
19 language skills were adequate for the interview.

20 He was spontaneous. His grammar and enunciation
21 were at times, you know, impacted by the fact that English is
22 not his first language, but they were all generally reported
23 appropriate for his reported life history and his reported
24 level of education.

25 He had problems with newly acquired information or

DROB - DIRECT / TROWEL

40

1 at least appeared to, because he frequently asked me what my
2 profession was and asked me on multiple occasions whether I
3 spoke Yiddish. He also told me things, for example, that he
4 had liver cancer, spontaneously on multiple occasions,
5 seemingly not aware that he had already told me this.

6 He had some difficulty with simple numerical
7 calculations, although when I later on in my examination
8 provided him with simple numerical calculations where there
9 was a forced choice between correct and incorrect answers, on
10 one occasion he got 21 out of 25, on another occasion 24 out
11 of 25 correct.

12 His thinking was generally logical and goal-directed
13 and coherent. There wasn't anything that appeared to me to be
14 psychotic. He wasn't hallucinating. He didn't appear to be
15 delusional, although he had some what I would call fixed false
16 beliefs. And those included repeat, or at least expression of
17 these beliefs included expressing on multiple occasions the
18 notion that he had liver cancer, even though multiple doctors
19 and the record supports the notion that he had a benign
20 problem with his liver.

21 And also, the idea that the judge had already
22 informed him that he would not be prosecuted in the case
23 because of his Alzheimer's disease, which, taken at its face
24 value, if he believed that would be considered a fixed false
25 belief, because he repeated it a number of times even when I

DROB - DIRECT / TROWEL

41

1 corrected him.

2 He denied that he had any suicidal thoughts. He
3 said that he felt fine when I examined him, although he'd like
4 more fresh air and exercise. He told me that he had knee
5 surgery and that he needs a cane to walk. He denied that he
6 was nervous. He said that he had normal sleep and appetite.
7 He said that he was angry about his case and then he again
8 provided spontaneously an account of circumstances that he
9 believes completely exonerate him in the case. He said
10 that he -- he became somewhat agitated and said that "I'm
11 asking for immediate release because of my innocence."

12 He again complained of memory problems. He said
13 that he had been sent to Butner by the judge, where he was
14 prescribed the medication Aricept for his dementia. He told
15 me that he had heard that there was a new very expensive drug
16 that would be better for his Alzheimer's disease and was
17 wondering why it hadn't been given to him and he would like to
18 have it. He said that he was disappointed that he did not get
19 that prescription. I asked him if he knew the name of the
20 medication. He couldn't tell me.

21 I asked him to explain the proverb what goes around
22 comes around, and he answered: "If you do something bad, it's
23 going to be bad for you." I asked him to explain the proverb
24 people in glass houses shouldn't throw stones, and his
25 response was "because you're going to break the house." I

SHERRY BRYANT, RMR, CRR

DROB - DIRECT / TROWEL

42

1 should note that that response is concrete and incorrect, but
2 I had to take into consideration the fact that he probably
3 wasn't exposed to that expression as a person growing up in
4 the United States would have been and would probably have more
5 difficulty with it.

6 I asked him what he should do if he found an
7 envelope in the street that's sealed and addressed and has a
8 new stamp on it. He responded that he'd put it in the
9 mailbox.

10 I asked him what he would do if he was the first
11 person to see smoke and fire in a crowded theatre, and he
12 said: "I'd get away from the theatre."

13 When asked why he needs a doctor's prescription to
14 purchase certain drugs, he said: "So I gonna feel better." I
15 asked him, well, why do you need the prescription? And he
16 said: "How am I going to buy the drugs," and made a gesture
17 expressing a question.

18 He seemed confused regarding certain facts related
19 both to his case and also to his medical history. I mentioned
20 those already. When I told him that the judge was reserving
21 decision on the question of whether or not he would find him
22 unable to stand trial because of what he described as a brain
23 memory problem he seemed to understand it, but a half hour
24 subsequent to my explaining that to him he repeated again that
25 the judge was going -- had already told him that the case

DROB - DIRECT / TROWEL

43

1 would be dismissed. The same with the liver cancer. He
2 seemed to agree and even state that one of the doctors had
3 told him that he didn't have liver cancer, but then again
4 later on in the interview and also subsequent interviews
5 restated that.

6 He asked me several times who it was that I
7 represent, and I explained to him on each occasion that I was
8 a psychologist who had been appointed by the judge and
9 asked -- and I'd been asked to do an evaluation of his
10 competency to stand trial. He seemed to understand this when
11 I told him, he agreed, but then appeared at times later on to
12 be confused again as to my role.

13 When I saw him on February 11th, he recalled who I
14 was. I asked him what my profession is and he said a
15 psychiatrist. I am, in fact, a psychologist, but that is an
16 error that I often hear. He told me that he knew that I had
17 come to see him before and he asked me why it took me so long
18 to visit him again. In fact, I had told him at the original
19 meeting that I would be back in about two weeks and this was
20 about two weeks later, so, you know, I said, I think I'm here
21 when I said I would be, and he didn't protest. I again
22 reminded him of my role and I proceeded to do some testing at
23 that point.

24 So that's essentially the interview that I conducted
25 with the defendant.

SHERRY BRYANT, RMR, CRR

DROB - DIRECT / TROWEL

44

1 THE COURT: Did you come to a conclusion with
2 respect to his ability, in terms of his competence?

3 THE WITNESS: At that point or in general?

4 THE COURT: In general.

5 THE WITNESS: I did.

6 THE COURT: What was your conclusion and what was it
7 based on?

8 THE WITNESS: Well, my conclusion is that the
9 defendant is incompetent to stand trial on -- and it's based
10 on a number of things. I have to say that this is a difficult
11 case and I struggled with this issue, and there was certain
12 information that I would like to have had in this case and
13 certain procedures that I would have liked to have undertaken
14 that I was unable to do so. And if you'd like me to describe
15 those --

16 THE COURT: Well, why don't you tell us what you
17 concluded and then talk about what you wished you would have
18 had.

19 THE WITNESS: Very good. I concluded that while the
20 defendant is and was inconsistent in the effort that he made
21 on some psychological tests, that the pattern of his
22 responding to psychological tests, beginning in two thousand
23 and I believe 11 when he was first examined and in 2013 when
24 he was examined a second time with me, was generally
25 consistent with a decline, a progressive decline in his

DROB - DIRECT / TROWEL

45

1 cognitive functioning.

2 He particularly had difficulty with assimilating or
3 responding to new material that he would need to retain in
4 memory while responding. He did better on material that was
5 right in front of him. So if you asked him to work with
6 blocks or to look at pictures and make judgments about them,
7 he had an easier time because it was in front of him. He had
8 much more difficulty when he had to recall digits or recall
9 images, recall figures or recall words or stories.

10 The issue in the case for me -- there were two
11 issues -- three issues: One, does he suffer from a dementing
12 process. In other words, are there genuine deficits and
13 progressive deficits in his cognitive functioning. And based
14 upon all of the information that I was able to review,
15 including the prior reports, my own testing, my own
16 examination of him, my speaking with collateral sources, my
17 conclusion is yes, that he has a progressive decline in his
18 cognitive functioning. I cannot say what the origin of that
19 decline is, but it may be multiply caused.

20 One factor that leads me to this conclusion, apart
21 from the results of an ostensive decline both in his
22 reported -- in his memory process when you interview him and
23 also on psychological testing is the fact that he had been --
24 I'm not a neurologist so I can only take the prior reports at
25 their face value. When he had been examined and brain scans

SHERRY BRYANT, RMR, CRR

DROB - DIRECT / TROWEL

46

1 done, reports had indicated that there was findings on MRI
2 that were consistent with both potential Alzheimer's disease
3 and also placed him at risk for some cerebral
4 circulatory-based dementia.

5 Another issue that came up -- so all of the
6 conditions you've seen and even those who thought that he was
7 malingering in the past have all concluded that he is at least
8 probably, if not definitely, suffering from some memory
9 decline. The people who saw him in 2013 saw him as partially
10 exaggerating his symptoms, partially having memory decline,
11 but marginally or just kind of over the borderline to be
12 incompetent.

13 Everything that we know about dementia, both of the
14 cerebrovascular type and of the Alzheimer's type, is that it's
15 progressive and it tends to get worse over time. I saw him
16 two years later. His test performance and general demeanor
17 was worse. The report from his family, the report from his
18 lawyer indicated a progressive decline in his functioning.
19 And he particularly declined progressively on those tests such
20 as those that assess processing speed that are the ones that
21 are most sensitive to neuropsychological decline or
22 progressive dementia.

23 So all of that is consistent. When you bring in the
24 fact that he had these brain scans that were consistent with a
25 dementing process, I concluded that it was fair to conclude

SHERRY BRYANT, RMR, CRR

DROB - DIRECT / TROWEL

47

1 that, in fact, he does have some form of cognitive decline,
2 probably a progressive dementia.

3 The question then arises, if he does have the
4 dementia, does he nevertheless have enough brain power, if I
5 can use the term, or enough mental power to nevertheless be
6 competent and be tried. So that's a second question.

7 And a third question is, is it possible that he may
8 be exaggerating his symptoms so as to appear worse than he
9 actually is and, therefore, bring him below the threshold of
10 competency.

11 So with regard to the second question, which is does
12 he have enough cognitive capacity to be competent, this is an
13 area that I felt a little handicapped in, and I'll describe it
14 later. But based upon at least his presentation, the report
15 of his attorney, his answers to my questions about his case,
16 these suggested to me that he had such a problem in retaining
17 new information and maintaining a mindset about information
18 that had been given to him, both by me and by counsel, as to
19 make it extremely difficult for him to function in his own
20 defense.

21 Now, there are two prongs to the competency test.
22 The first prong is does he understand -- does he have rational
23 understanding of court procedure, and the second is can he
24 assist counsel with a reasonable degree of rationality in his
25 own defense.

SHERRY BRYANT, RMR, CRR

DROB - DIRECT / TROWEL

48

1 Well, with regard to the first prong, it appears to
2 be throughout all of the examinations that he does meet that
3 threshold. He understands the role of the lawyer. He
4 understands the role of the prosecutor. He is somewhat more
5 limited in his understanding of the role of the judge, but, in
6 a general way, he understands that the judge is there to
7 protect his rights and also is in some way involved in helping
8 to determine his guilt or innocence. He knows that the jury
9 is there to help to determine his guilt or innocence.

10 He understands what evidence is. He understands
11 what testimony is. He understands, at least by what he says,
12 not necessarily in terms of his definitions, but it's clear
13 that he understands what a plea offer is, what a plea bargain
14 is. He also provides a general description of at least some
15 of the charges that he is charged with, and when he's told
16 specifically what they are he seems to grasp them.

17 But he has difficulty focusing on how he might
18 defend himself, and he provides -- at least in my limited
19 understanding of the facts of this case, he provides facts
20 about the case in his own defense that are completely
21 inconsistent with the evidence against him. And he
22 consistently goes back to those and also consistently goes
23 back to rulings that the judge he says has made that are
24 counterfactual.

25 So all of that taken together leads me to conclude

DROB - DIRECT / TROWEL

49

1 that, at least on its face, he can't assist appropriately with
2 counsel.

3 The next question and the most difficult question
4 is, is what is the -- how much of this is exaggeration and how
5 much of this is genuine? And this is the -- to me, the second
6 issue is also somewhat difficult and I'll explain why later,
7 but the third issue is the most difficult issue in this case.

8 And the reason for this is that malingering is a
9 form of lying. It's a way in which an individual --
10 malingering is the conscious willful production of false
11 psychological or medical symptoms. It's lying. It's very
12 difficult scientifically to determine whether somebody is
13 lying or whether someone is malingering.

14 And the approach that I take is I guess I would call
15 it what I would call a Wittgensteinian approach. The
16 philosopher Wittgenstein has this notion of how to look at a
17 person's intentions, and that's to look at all -- the widest
18 possible context of their behavior and try to determine, based
19 on looking at that wide as possible context, what their
20 intention is or what action they are taking as opposed to
21 simply focusing on one aspect of their behavior.

22 And when we look at the widest context, at least the
23 context that was available to me, the weight of the
24 information suggests that while he may be exaggerating some of
25 his symptoms at times and at times doesn't put forth full

DROB - DIRECT / TROWEL

50

1 effort on psychological testing, the weight of the evidence to
2 me, in my experience, speaks against malingering being the
3 major component in his incompetent presentation.

4 My reasons, I've already expressed some of them, but
5 some of the other reasons are as follows. My experience is
6 when people malingering in competency, they usually go right for
7 the questions that relate to the competency examination.
8 Someone who wants to malingering in competency, the easiest thing
9 for them to do would be to say, I don't know what I'm charged
10 with, or to be confused about the role of their attorney or to
11 say that the judge is conspiring against them. And I've done
12 hundreds of these, literally, over the years and I find people
13 doing that sometimes. Sometimes people genuinely say those
14 things, but people who are exaggerating their symptoms often
15 do that.

16 He does not do any of that. In fact, in all of the
17 examinations that have been conducted, including my own, he
18 passes that prong of the competency examination. He tells me
19 what a judge is. He tells me what a lawyer is. He tells me
20 that he likes his lawyer. He says that he can cooperate with
21 counsel. He tells me that he likes the judge. He doesn't say
22 that people are conspiring against him. He understands
23 generally what the charges are against him and is able to talk
24 generally about them.

25 If he was malingering, it would be a kind of a

DROB - DIRECT / TROWEL

51

1 subtle move for him. It's possible he could do this, to say,
2 I'm going to give the doctor good answers on the competency
3 questions, but I'm going to go round the edges in places
4 where, you know, it wouldn't be obvious and show deficits
5 there.

6 It's harder for me to believe that he's doing that
7 than to believe that he genuinely understands what the charges
8 are but he has problems assimilating new information, which is
9 consistent with everything else that I've seen in terms of at
10 least some of the testing and the reports of counsel, who
11 describe to me how over the years that she's known him at
12 first he would not remember something from two meetings ago,
13 then it was from the last meeting, and then it was from within
14 a particular meeting.

15 I found when I examined him that he had problems
16 remembering things from within a particular meeting with him.
17 I would tell him things and he would then repeat
18 misinformation within that same meeting. He would have to be
19 a pretty subtle malingerer to titer his decline in the way
20 that he did, both progressively declining on certain cognitive
21 tests that were administered to him and also progressively,
22 not radically but progressively declining in his presentation
23 to counsel, and also, if you go and read the reports, to his
24 presentation to me to progressively decline in such a way as
25 to look like the decline of an Alzheimer's patient in the slow

DROB - DIRECT / TROWEL

52

1 but progressive decline that they have. I haven't seen
2 malingerers do that. That's a pretty concerted effort over an
3 enormous period of time.

4 The third thing here that relates to the issue of
5 malingering has to do with what the family has told me. Now,
6 I agree that and I became very skeptical about this client
7 when I heard those phone conversations. The phone
8 conversations do not show Mr. Bumagin telling his family
9 members to lie, at least as I read them. He's not saying to
10 them that they should make things up, but he's encouraging
11 them to get information from other medical providers to show
12 that he has total Alzheimer's disease, which at that point in
13 2012 or whenever these phone calls were made would have
14 probably been an exaggeration; but if he had been seen by
15 doctors, which apparently he had been, who told him that he
16 might have Alzheimer's or might have a dementia, it might not
17 be unreasonable for him to try to marshal that information.
18 Nevertheless, it suggested to me that he might be prone to
19 pressuring family members and I became concerned about that.

20 I did call two of his family members, his sister and
21 his son. And in each case, they told me on the telephone with
22 what I regarded to be appropriate, not feigned affect, meaning
23 the sister Marina was crying to me on the telephone about her
24 experience with her brother and how he's declined
25 progressively to the point that at times he couldn't even

SHERRY BRYANT, RMR, CRR

DROB - DIRECT / TROWEL

53

1 remember that his mother was gone or that he had a grandchild
2 while at other times he could, which, by the way, is not
3 inconsistent with someone with a dementia. They have good
4 days, bad days, sometimes good hours and bad hours. And she
5 told me -- it would have been a huge acting performance for
6 her to have spent the 20 minutes or so that she did on the
7 telephone in tears talking about the decline of her brother.

8 The son, whose name is Martin, who I understand both
9 from Martin himself, from the defendant and also from doing a
10 Google search on Martin, is a decorated Iraq war veteran and
11 who seemed to me to be an individual who was somewhat angry
12 and skeptical towards his father, not someone who would be
13 conspiring with him to fake a dementia, he also described to
14 me a progressive decline in the defendant's cognitive
15 capacity, again, to the point where certain memories that he
16 had at some points he no longer had and where he seemed to be
17 really functioning very poorly.

18 Martin also described to me that initially he
19 thought that that decline was the result of his substance
20 abuse, and he said he doesn't know why he's declined now and
21 why it continues, but that it has gotten worse since he's been
22 in jail.

23 So, again, taking what the family members say,
24 unless I am going to completely discount what they say or
25 heavily discount what they say, they lay witness to the same

SHERRY BRYANT, RMR, CRR

DROB - DIRECT / TROWEL

54

1 decline that his attorney says, which also suggests to me that
2 this is actually cognitive deficit that I'm looking at, a
3 progressive cognitive deficit that I'm looking at rather than
4 simply malingering or exaggerating.

5 And as I mentioned earlier, if he was marginally
6 competent in 2013 and he is, in fact, suffering from a
7 dementia, it stands to reason that he would further decline
8 over the two years, and that's exactly what it seems both the
9 collateral sources and generally my testing show.

10 Now, some of the psychological tests, even ones that
11 I administered, for example, the Test of Malingered Memory,
12 look like -- certainly were invalid, and all of that did give
13 me some pause. But I should point out that these tests, while
14 they're very ingenious and very interesting, they are, you
15 know, relatively new. We've been using them for 10 or 15
16 years and the jury is still out, in my view, as to how to
17 interpret them.

18 For example, the Test of Malingered Memory, on which
19 he did very well for Dr. Mindt but failed in my case, is a
20 good test, but recent research seems to suggest that it's good
21 except where Alzheimer's disease is suspected. Well, in his
22 case Alzheimer's disease is suspected, so it leads me to be
23 somewhat skeptical regarding these tests.

24 In general, tests of malingering have difficulties
25 because malingering, as I pointed out, is lying. It's not a

1 diagnostic entity. It's very, very hard to validate these
2 tests. If you want to have a test for cancer, let's say, or
3 even a test for schizophrenia, cancer and schizophrenia are
4 stable disease entities or at least stable functional entities
5 that exist today and they exist tomorrow and they exist and
6 they've existed in the past and will for the foreseeable
7 future.

8 Someone can malingering in the morning and not malingering
9 in the afternoon. It's lying. It's a moving target. It's
10 very, very hard to validate these tests. And even those
11 individuals who are the creators of these tests warn against
12 simply making judgments on the basis of the tests.

13 And in Mr. Bumagin's case, in many instances he did
14 quite well on validity testing. So, for example, after
15 flunking the Test of Malingered Memory, I then readministered
16 a 25-item arithmetic test, which I presented to him as a test
17 to see if he could remember how to do arithmetic. And in this
18 test he's given 25 relatively simple arithmetic problems. I
19 think, you know, 109 and 86 would be a difficult one on this
20 test. And he proceeded then to get 24 out of 25 of them
21 correct.

22 In forced-choice testing, we have what's called a
23 smoking gun exaggerated profile when someone chooses the
24 majority of the time the wrong answer. So if I give you 25
25 relatively simple arithmetic problems and you choose the wrong

DROB - DIRECT / TROWEL

56

1 answer on 24 out of 25 of them, we know logically that you
2 knew the correct answer and you've chosen the wrong one.

3 Well, he didn't do that. He got 24 out of 25 right
4 in the same situation where he did so poorly on the TOMM. The
5 TOMM is a test that requires sustained attention. It requires
6 an individual to sit and look at 50 pictures, each of which
7 are exposed for a couple of seconds. And an individual whose
8 attentional processes are greatly impaired, just in my
9 experience, has enormous difficulty with this. And it's more
10 consistent, in my view, with a serious attentional deficit
11 rather than an effort to feign that he did poorly on this
12 test.

13 But I am willing to acknowledge that there may be an
14 exaggeration component to his psychological profile, but when
15 you take into consideration the full picture, overall, I
16 concluded that he does suffer from progressive dementia, that
17 on the basis of his presentation that the presentation is one
18 of an individual who looks to be competent on the first prong
19 of the standard but who has problems really providing relevant
20 information and staying on point with counsel and, therefore,
21 is incompetent on the second point; and that while there may
22 be some exaggeration and there certainly is a motive, clearly
23 at this point a motive to be found incompetent and to be found
24 incompetent because he has Alzheimer's disease, in spite of
25 that exaggeration and in spite of that motive, on the whole,

SHERRY BRYANT, RMR, CRR

DROB - DIRECT / TROWEL

57

1 the evidence suggests to me -- and I said before that this is
2 a difficult case -- that he's not -- the majority of his
3 presentation cannot be attributed to malingering and that it's
4 actually attributed to a progressive dementia.

5 THE COURT: With that, we're going to take a
6 10-minute recess and I'm going to allow the government
7 attorney to resume his questions with that focus. We'll take
8 a 10-, maybe 15-minute break. Okay? Thank you, Doctor.

9 (Recess.)

10 THE COURT: All right, I interrupted your
11 examination. You may continue your examination.

12 MR. TROWEL: Thank you, Your Honor.

13 BY MR. TROWEL:

14 Q Dr. Drob, I'd like to talk about some of the tests that
15 you administered in the course of your evaluation. One test
16 you administered is the RBAN test, R-B-A-N; is that right?

17 A R-B-A-N-S.

18 Q R-B-A-N-S. And on that test, the defendant got one out
19 of 12 questions right; is that correct?

20 A Well, that's not correct. I'm not sure what you're
21 referring to. I mean, there are many more than 12 questions
22 on the RBANS.

23 Q Do you have in your -- do you have the report with you?

24 A Yes.

25 Q Can you just tell me what his score was on the RBANS

DROB - DIRECT / TROWEL

58

1 test?

2 A He had a score of 47.

3 Q And where does that fall on the range of scores?

4 A Lowest 0.1 percentile.

5 Q So he scored in the lowest 10th of a percentile?

6 A Yes.

7 Q On the RBANS test?

8 A That is correct.

9 Q That's about the lowest score anyone could receive on the
10 test; is that right?

11 A Well, when you get down that low you're down at a point
12 where there aren't enough people in the subject pool to get
13 norms that are lower. His raw scores were not zero. I've
14 seen people do poorer. But when you get down that low you're
15 around -- that's as low as the test bottoms out in terms of
16 the norms.

17 Q At that level, someone who scores at that level in the
18 RBANS might have trouble with daily tasks like dressing and
19 personal hygiene and things of that sort?

20 A Not necessarily.

21 Q Oftentimes?

22 A Sometimes, yes.

23 Q But you described the defendant as speaking to you
24 logically in a goal-oriented way; right?

25 A That is correct.

DROB - DIRECT / TROWEL

59

1 Q You also said that you noted that in discussions with
2 you, he was pretty good or decent, at least, on stuff about
3 the Court and the role of the Court and the prosecution and so
4 forth?

5 A That is correct.

6 Q And he had been good on those things really going back to
7 the first evaluation, or good enough, anyway?

8 A Yes, absolutely.

9 Q And there wasn't any significant deterioration in his
10 ability to discuss those issues over the three years since his
11 first evaluation?

12 A It's unclear to me whether or not it deteriorated, but it
13 was still good enough by the time I saw him.

14 Q Did you note in your report anywhere that his discussion
15 of the Court or the prosecution had deteriorated, to your --

16 A No.

17 Q You also noted that during the interviews he made jokes
18 with you; right?

19 A That is correct.

20 Q And humor is a higher mental function; right?

21 A Yes.

22 Q It would be unusual, wouldn't it, for somebody who scores
23 in the lowest tenth of a percent to be someone who speaks
24 logically, coherently and jokes frequently? Would it be
25 unusual?

DROB - DIRECT / TROWEL

60

1 A Not in my experience.

2 Q It's common?

3 A Yes. People score very, very low on this test very
4 commonly whose presentation is impaired, but not so impaired
5 that they can't act like a human being.

6 Q Well, I didn't ask whether he was acting like a human
7 being.

8 A Well, making jokes, having a conversation, being able to
9 have some memory of their past. I've administered this test
10 hundreds of times and people sometimes score this low who have
11 a dementia or other serious cognitive deficit without showing
12 the kinds of severe deficits that you are suggesting would be
13 concomitant to that.

14 Q It would be -- just as a yes-or-no answer, it would be
15 possible for somebody who speaks coherently and logically and
16 jokes and can recite a chronological and coherent history,
17 it's possible that somebody who has those features and yet
18 scores in the bottom tenth of a percent is exaggerating their
19 deficits on the RBANS test?

20 A It is possible.

21 Q Now, in general, isn't it fair to say that deterioration
22 in the quality, quantity and meaningfulness of speech in
23 verbal comprehension characterizes most Alzheimer's patients
24 relatively early on in the disease?

25 A I think that's fair to say, yes.

DROB - DIRECT / TROWEL

61

1 Q But you said now three years after his initial evaluation
2 that his English language expressive and receptive skills were
3 adequate for normal conversation, verbal spontaneity, grammar,
4 enunciation, comprehension of speech were all generally
5 appropriate for his life history and level of education?

6 A Yes. With certain caveats, yes.

7 Q Now, you administered the Test of Nonverbal Intelligence;
8 that is right?

9 A I think I attempted to administer that, yes.

10 Q And you also administered the Matrix Reasoning Test?

11 A Yes.

12 Q Now, both of those tests measure visual reasoning; is
13 that right?

14 A That is correct.

15 Q Now, it's the ability to think and reason without words?

16 A Yes.

17 Q Now, is it fair to say that those tests essentially
18 measure the same thing?

19 A They're very similar tests.

20 Q And on the Test of Nonverbal Intelligence, he scored in
21 the 32nd percentile?

22 A I don't think he scored in the 32nd percentile. It's
23 possible -- could you direct my attention to either my report
24 or the raw data?

25 Q I don't actually have the raw data. Only you have it.

DROB - DIRECT / TROWEL

62

1 But I will find it in here.

2 A Okay, agreed, 32nd percentile.

3 Q And that's generally the overall average range; right?

4 A Somewhat below average, yes, but for his age, yes.

5 Q But on the Matrix Reasoning Test, he scored in the lowest
6 1 percentile?

7 A That is correct.

8 Q Now, given that those two tests measure essentially the
9 same thing, it's fair to say that those are inconsistent
10 results; right?

11 A Well, I can't answer that question with a yes or no. I'd
12 have to explain.

13 Q So it's possible that they are consistent results?

14 A It's possible that they are consistent.

15 Q Why don't you tell us.

16 A Okay. The Test of Nonverbal Intelligence is normed -- I
17 want to say this without bringing in issues that are
18 irrelevant to the case. Many people who score very poorly on
19 the Wechsler Adult Intelligence Scale and even on the Matrix
20 Reasoning Test end up with scores that are much higher on the
21 TONI. And the reason for this is that the population on which
22 the TONI is normed tends to do much more poorly in terms of a
23 raw score on this Matrix Reasoning Test than the people who
24 take the Wechsler.

25 I think there is some discrepancy here, but the

DROB - DIRECT / TROWEL

63

1 discrepancy is not as great as it would be between a 32
2 percentile and a 1st percentile. I commonly give the TONI to
3 individuals who score in the mid 70s to 80 on this test who on
4 the Wechsler test score in the 50th -- score in the 50s or low
5 60s. They essentially are scoring in the 10th, 15th, 20th
6 percentile on the TONI and scoring the lowest 1st percentile
7 on the WAIS.

8 So the inconsistency which appears on its face is
9 partly explicable on the grounds that there's a very different
10 type of sample utilized with the TONI.

11 Q So you had patients who score in the sort of 10
12 percentile range on the TONI -- and that's the Test of
13 Nonverbal Intelligence; right?

14 A 10, 15 or 20.

15 Q And then those people are also scoring down at the bottom
16 of the Matrix Reasoning Test?

17 A That's true, yes.

18 Q But those two scores are certainly more comparable than
19 the ones that you had from the defendant; correct?

20 A Yes. I think that there is something of a discrepancy,
21 although if you look at the TONI items that get you that 32nd
22 percentile, they're easier than even some of the items he got
23 on the Matrix Reasoning.

24 I really -- you know, I looked at this and I
25 wanted -- I don't think that the inconsistency is really

DROB - DIRECT / TROWEL

64

1 there. Very quickly you score -- on that TONI, it's amazing
2 how quickly you get up in the 20th and 30th percentile on that
3 test.

4 Q So you said there are questions on the Matrix that
5 were --

6 A Uh-huh.

7 Q -- easier than ones on the TONI?

8 A Yes. I mean --

9 THE COURT: You have to let him finish the question
10 and you can't go uh-huh, because uh-huhs don't translate into
11 yes or no. Go ahead.

12 Q You said that there were questions on the TONI easier
13 than questions on the matrix that he got right. So a question
14 of comparable difficulty, he got it right on the Matrix and
15 wrong on the TONI. You saw instances of that?

16 A Let me take a look.

17 Q I thought that was what you just said, but --

18 A Yes, I did say that, but I want to make sure that I'm not
19 misspeaking. (Reviewing.) I can characterize it more
20 specifically. He got -- he peaked out on the TONI at the
21 point where you would start administering this test to an
22 individual of normal intelligence who was ten years old. He
23 didn't get any items -- he didn't get credit for items past
24 that point.

25 On the Matrix Reasoning, he got the first three

DROB - DIRECT / TROWEL

65

1 items correct, which are extremely easy, and then bottomed out
2 at that point. So what I'm saying is if you look at the raw
3 scores, he did terribly on both of these tests. It translates
4 to a higher score on the TONI, but it doesn't translate into a
5 higher score on the Matrix Reasoning.

6 I don't think that I can say accurately that he got
7 more difficult items on the Matrix Reasoning than he did on
8 the TONI. In that sense, I misspoke. But he did very poorly
9 in terms of the actual looking at clinically what he did on
10 both tests.

11 Q But you noted earlier that the difference is -- it's more
12 significant than you often see where you have patients who are
13 getting 10 or 15 and then 1 percent on the Matrix. This is
14 more significant?

15 A I would say that's fair, yes.

16 Q And one possible explanation for that is that he was
17 giving inconsistent effort on one or the other or even both of
18 those tests?

19 A One possible explanation.

20 Q Now, you gave the Test of Memory Malinger; correct?

21 A Yes.

22 Q That's -- we'll call that the TOMM, T-O-M-M, test?

23 A Yes.

24 Q Now, in general, when you're giving a test, it's
25 important, I think, right, to follow the protocol of the test;

DROB - DIRECT / TROWEL

66

1 is that fair to say?

2 A Yes.

3 Q And typically on these kinds of tests, a publisher would
4 provide scoring sheets and other materials that you use when
5 you administer it; right?

6 A That is correct.

7 Q And is it fair to say that it's important to properly
8 score a test, because you need to make sure that it's going to
9 be interpreted correctly?

10 A That is correct.

11 Q So in this case, you've reviewed tests that other doctors
12 have done and it's important for you to be able to understand
13 the scores on those tests?

14 A Yes.

15 Q Now, the TOMM, that's the only validity test that you
16 administered?

17 A Well, I administered the arithmetic procedure and I
18 administered the embedded forced choice memory procedure
19 within the RBANS. So I administered three additional
20 procedures. This is the only formal malingering test I would
21 say that I administered, yes.

22 Q And he scored below the cutoff on all -- not only the
23 TOMM, but also those other embedded tests as well?

24 A Well, he got 15 out of 20 on the RBANS. Given the
25 general picture, I don't see that as a malingered or

DROB - DIRECT / TROWEL

67

1 exaggerated score. He got 15 out of 20 of them right. As I
2 mentioned before, if he had scored less than chance on that, I
3 would have concluded that he was probably intentionally
4 malingering. That score is a marginal score. But if, in
5 fact, he has dementia, that's what I would expect.

6 With regard to the arithmetic tests, he didn't do
7 great. I would expect somebody to get them all right if they
8 were a functioning adult, because they're easy arithmetic
9 problems. He got 21 out of 25 right one time and 24 out of 25
10 right the second time.

11 Q Now, it's true, isn't it, that an individual doesn't need
12 to fail multiple validity tests in order to raise a question
13 about their effort; right?

14 A No. Right.

15 Q So even failure on a single validity test should for the
16 examiner call into question the results of the entire battery?

17 A It makes you question it, yes.

18 Q And -- withdrawn. Now, you did three trials of the TOMM
19 test; correct?

20 A Yes.

21 Q Do you have the scoring sheet with you for the first
22 administration?

23 A I think I do. Okay, I have it.

24 Q Is that the sheet that the publisher provides --

25 A No.

DROB - DIRECT / TROWEL

68

1 Q -- to give the test?

2 THE COURT: You have to let him finish.

3 THE WITNESS: I'm sorry.

4 Q Is it the sheet that the publisher provides?

5 A No.

6 Q Is it one that you created yourself?

7 A Actually, I borrowed it from a colleague, because I was
8 out of sheets, and so I took this on that particular day. I
9 realized that I didn't have it so I had created it.

10 Q On this sheet for questions 2, 5, 6 and 12, did you note
11 whether the defendant got the question correct or incorrect?

12 A Okay. Those items, for those items -- and there were
13 seven of them -- he said he couldn't provide an answer.

14 Q But you didn't indicate on the sheet what happened. It's
15 just blank?

16 A I left it blank. And on the bottom he got seven of them
17 that he couldn't provide. He got 18 correct and 25 wrong.

18 Q But that's not sort of the proper way to score the test;
19 is that fair to say?

20 A Well, it isn't, but the -- typically people will guess,
21 and even when asked to guess he wouldn't.

22 Q But somebody trying to interpret that score would have a
23 difficult time understanding the score sheet you used, because
24 it's incorrect?

25 A Fair enough.

DROB - DIRECT / TROWEL

69

1 Q And you determined that the defendant scored 23 out of 50
2 on that first trial; is that right?

3 A Well, he actually only got 18 of the 50 on the first
4 trial. The 23 is just the number -- the page number of my --
5 of the materials that I sent to your expert.

6 Q So he got 18?

7 A 18 out of 50, that is correct.

8 Q That's actually well below chance?

9 A It's below chance. 25 out of 50 would be below chance,
10 yes.

11 Q And to go that far below chance, you would expect that he
12 had deliberately avoided correct answers on some questions;
13 right?

14 A He might have, yes.

15 Q Now, do you have your scoring sheet for the second trial?

16 A Yes.

17 Q Is that another one that it's not the correct one?

18 A That's not the correct one. And actually, I realized
19 that the sheet my colleague gave me wasn't even correct for
20 trial two, so I had to just put the answers on the sides.

21 Q Right. So on that question, you circled some responses,
22 you crossed out others, but you didn't indicate whether it was
23 correct or not?

24 A Well, after circling the responses and I realized that
25 this sheet wasn't made correctly, so I went and indicated on

DROB - DIRECT / TROWEL

70

1 the left questions 1 through 25 and on the right questions 26
2 through 50, a checkmark means it was correct and an X mark
3 means that he got it incorrect.

4 Q That scoring system is not the proper protocol for the
5 test; right?

6 A Correct or incorrect.

7 Q But you're using the wrong sheet and you're doing it in a
8 way that it would be difficult for somebody else to interpret
9 that; right?

10 A Well, yeah, I would say that, you know, I had to make do
11 with what I had, given that my materials were faulty. But I
12 think that anyone who sees this, on trial two that he got 25
13 out of 50 is my score, and I think someone would be able to
14 see that.

15 Q When you say your materials were faulty, you just mean
16 you didn't get the correct sheet?

17 A I didn't have the correct sheet and the sheet that I
18 borrowed wasn't well done.

19 Q As a certified, board certified professional, as a
20 licensee, those are things that you're -- you're expected to
21 follow these protocols test to test; right?

22 A Yes. I would say that this was, you know, an unfortunate
23 problem in my materials, but given the fact that I was there
24 already and needed to administer this test, I administered it
25 in the correct way for these first two trials and I did get

DROB - DIRECT / TROWEL

71

1 scores that I believe are reliable.

2 Q What was his score on the second?

3 A 25 out of 50.

4 Q So he improved from the first test where he scored below
5 chance, on the second test he scored approximately chance;
6 correct?

7 A That is correct.

8 Q So that means that's a score consistent with someone
9 who's just guessing?

10 A That would be true. That doesn't have any information,
11 no.

12 Q And then you gave it a third time; right?

13 A Yes, I gave it a third time, but in this instance I
14 didn't wait -- I didn't use a retention -- I gave the
15 retention trial right away just to see how he would do on a
16 third trial. This isn't really part -- this isn't the
17 retention trial. This is the third trial that I administered
18 to see if he would improve with a third exposure to the
19 stimulus.

20 Q And you just scored this just on a regular piece of
21 paper?

22 A Yes.

23 Q So not on the proper sheet?

24 A That is correct.

25 Q Can you just take a look and recount the number of

DROB - DIRECT / TROWEL

72

1 correct answers he scored on this?

2 A It looks as if it's 32.

3 Q You scored it in your report, though, as 35, I believe;
4 is that right?

5 A That is correct.

6 Q So there was an error in your scoring?

7 A That is correct.

8 Q But nevertheless, his scores went from 18 to 25 to 33
9 over the course of the three administrations?

10 A It went to 32, yes.

11 Q 32, I'm sorry. So he, in fact, improved over the course
12 of your administration of these three tests?

13 A With more exposure to the memory stimulus, he got better.

14 Q But on the first version you gave, he actually -- there's
15 some evidence at least that he intentionally avoided the
16 correct answer, correct, because he scored below chance?

17 A Yes. You know, if somebody was guessing, it's
18 conceivable that they would score below chance. You're not
19 going to get exactly chance each time if they're just
20 guessing.

21 Q Do you know what the odds of that are?

22 A I don't know what the odds are. But it's reasonable to
23 suggest that he might have chosen the incorrect answer on the
24 first --

25 Q Dr. Drob, in administering these tests, the way that

DROB - DIRECT / TROWEL

73

1 they're scored, it's important to know the chances of getting
2 a particular score by just guessing. That's something that
3 people who administer these tests typically know; right? It's
4 relevant to your assessment?

5 A I'm not sure -- there may be published norms on what the
6 chances are, of getting a 17 out of a 50 are. I don't know
7 what they are. It's not something that I typically would
8 know.

9 Q But isn't that important to assessing what an 18 out of
10 50 means?

11 A Fair enough. In fact, if you have that information, I'd
12 certainly be happy to take it into consideration.

13 Q Well, the question is not whether you'd take it into
14 consideration now. The question is whether you took it into
15 consideration at the time of your exam; correct?

16 A Well, my consideration, as I indicated in my report, it's
17 very possible that on this test he was attempting to present
18 himself as having dementia.

19 You know, given the research that says that the test
20 is unreliable with Alzheimer's disease or people who are
21 suspected of having Alzheimer's disease, something that I
22 learned subsequent to administering it to Mr. Bumagin, I tend
23 not to place that much emphasis and didn't go into a deep
24 analysis of this. But yes, he failed this test and did very
25 poorly on it.

DROB - DIRECT / TROWEL

74

1 Q So let me ask you about that issue, Dr. Drob. You said
2 you didn't learn that he was suspected of Alzheimer's until --

3 A No.

4 MS. DOLAN: Objection.

5 THE COURT: Well, you have to let him finish the
6 question. Give counsel a moment to object if she has an
7 objection, then I'll rule on it. Please, finish the question,
8 then before you answer it I'll hear the objection.

9 Q I may have misunderstood, so just to clarify. Did you
10 learn that the defendant may have been suspected of having
11 Alzheimer's after you administered the TOMM or before?

12 A Before.

13 Q So, going in to administer validity tests, you selected a
14 test that, based on your own understanding, is not appropriate
15 for people who may have dementia?

16 A Something I learned subsequently to administering it,
17 yes.

18 THE COURT: The answer to the question he asked you
19 is yes?

20 THE WITNESS: Yes.

21 Q So the only validity test -- the only formal validity
22 test you gave is one that you now believe is not appropriate?

23 A Well, the embedded test within the RBANS is a formal
24 validity test, but it's the only self-contained formal
25 validity test that I administered, yes.

DROB - DIRECT / TROWEL

75

1 Q Are you aware of the American Academy of Clinical
2 Neuropsychology's recommendation that, if possible, you give
3 multiple validity measures covering multiple domains?

4 A Yes.

5 Q And are you also aware that the American Academy of
6 Clinical Neuropsychology recommends that if you can't use
7 multiple validity indicators, you explain why in your report?

8 A Yes.

9 Q Did you do either of those things?

10 A Well, I did use multiple validity indicators. I
11 administered several forced-choice validity indicators in
12 addition to the TOMM. And I'm not sure if I explained why in
13 my report that I chose not to administer anything further. I
14 indicated that given how terribly poorly he did on the
15 cognitive testing, tests that I did administer, I didn't see
16 any point in administering any further cognitive testing.

17 I don't, on the basis of those cognitive testings,
18 draw the conclusion that he either has dementia or cognitive
19 deficits. I think that you have to discount those cognitive
20 tests, and I didn't see any point in, you know, getting
21 further information to indicate that.

22 Q But when you were describing earlier your ultimate
23 assessment of this case, I think you placed -- you raised as
24 an issue the question of whether he's exaggerating or not?

25 A That's true, yes.

DROB - DIRECT / TROWEL

76

1 Q And that was an important issue for you to resolve in
2 this case?

3 A It is, yes.

4 Q And, in fact, your conclusion that he's not exaggerating
5 in a way that sort of makes sense to you is something that
6 tipped this in favor of finding him incompetent, correct,
7 because you described it as a close call or difficult case?

8 A Yes, it is a close call. It is a difficult case. And my
9 conclusion was that in spite of some problems all along with
10 regard to validity testing, on balance, I believe that there
11 is evidence of a cognitive decline, yes.

12 Q But the validity testing, the results of the validity
13 testing was or would have been important to your assessment of
14 that ultimate conclusion, like how you reach that conclusion;
15 right?

16 A It potentially could have been. My experience with these
17 formal validity tests is that when you're dealing with
18 somebody who is really seriously compromised, their capacity
19 to sustain attention to do them is so limited that it reduces
20 the value of administering them.

21 As I mentioned in the case of the TOMM, he has to
22 focus on 50 pictures that are given a couple of seconds at a
23 time; and he just wasn't able, in my experience sitting there
24 with him, to maintain his attention on those 50 pictures.

25 Q Dr. Drob --

DROB - DIRECT / TROWEL

77

1 A And so further -- let me explain. Further validity
2 testing would have -- formal validity testing like the VIP
3 would have required even further sustained attention of the
4 type that he didn't appear to have to me.

5 Q But isn't that -- when you make that assessment, aren't
6 you assuming that the appearance of a lack of ability to focus
7 is true rather than feigned or exaggerated?

8 A Well, I'm not necessarily making that assumption. But
9 I'm saying that I think I need to look at other things apart
10 from his performance on these tests to make that -- to
11 ascertain that.

12 Q Just so I understand, you testified that you didn't feel
13 additional testing was appropriate because he didn't appear to
14 have the focus or wherewithal to do additional testing;
15 correct?

16 A Well, right, and he wasn't focusing. So if I had taken
17 out another test that required a similar amount of effort and
18 focus and engagement, it was my conclusion he wouldn't focus
19 again.

20 The question still remained up in the air in my mind
21 as to whether or not he was feigning or whether or not he
22 wasn't feigning, but it didn't seem to me to be a fruitful
23 enterprise to continue administering tests that he, at least
24 on the face of it, was not paying attention to. So that was
25 my reasoning process.

DROB - DIRECT / TROWEL

78

1 Q But your conclusion, even though at that moment you
2 couldn't know whether his lack of focus or ability in that
3 moment was true or feigned, even though you didn't know that
4 at the moment, you decided to stop with the testing and then
5 you ultimately concluded that he was incompetent?

6 A Yes, for the reasons I've stated.

7 Q Should you have given another validity test?

8 A In this case, I don't think so, because I think it would
9 be like reading the same article in the same newspaper. I
10 would just have gotten more of the same.

11 Q In other words, you believe he would have failed another
12 validity test?

13 A Look, he passed the validity tests that were simple
14 enough for him to deal with. The ones that are formalized and
15 used in practice are much more complex, require much more
16 sustained attention, and I think he would have not done well
17 on them.

18 Q So just to discuss that issue for a moment, the third
19 TOMM trial, there are 50 questions in that trial; right?

20 A That is correct.

21 THE COURT: You have to wait and you have to use a
22 microphone.

23 THE WITNESS: Okay.

24 Q And on the first 20, he actually got 17 correct; right?

25 A That's true.

DROB - DIRECT / TROWEL

79

1 Q That 17 out of 20, just taking those 20 sort of out of
2 the broader testing, that's a much higher percentage of
3 correct answers than he had gotten on certainly either of the
4 two prior tests; correct?

5 A Yes.

6 Q That's 85 percent; right?

7 A That is correct.

8 Q And then in the last 30, he scored roughly chance, he got
9 18 out of the last 30; right?

10 A That is correct.

11 Q One explanation for that, isn't it true, is that he just
12 stopped halfway through? Just yes or no?

13 A I'm not sure what you mean by stopped halfway through.

14 Q Stopped giving effort halfway through and guessed.

15 A It's possible that he may have lost focus and guessed for
16 the rest of the procedure, yes.

17 Q And on those first 17, though, getting 85 percent is a
18 strong indicator that he has the ability to answer the
19 questions, isn't it?

20 A Yes.

21 Q When you were describing your experience giving tests in
22 the past, you said -- I think one of the things you said was
23 that this defendant's -- if it's an attempt to seem
24 incompetent, it's not the kind that you typically see. Is
25 that fair?

DROB - DIRECT / TROWEL

80

1 A Yes.

2 Q Because typically, a defendant will come in and say, the
3 judge is out to get me or it's a conspiracy or something like
4 that; correct?

5 A Or not remember what those key figures are or remember
6 what the charges are, yes.

7 Q And usually that happens sort of right off the bat when
8 you start to talk to somebody?

9 A Well, I usually don't ask those questions in the first
10 few minutes of the interview, but it would happen in the
11 course of the interview, yes.

12 Q Is it fair to say that in the first part of your
13 interview with the defendant, though he didn't raise those
14 issues, he did tell you he had problems in the memory
15 department?

16 A Yes.

17 Q He told you he had head injuries?

18 A Yes.

19 Q He told you his father had Alzheimer's disease?

20 A That is correct.

21 Q And those things all happened sort of right at the front
22 end of your interview?

23 A Well, at the front end of the interview, he appeared to
24 have difficulty remembering various things, and by way of
25 explanation he told me that he had problems in the memory

DROB - DIRECT / TROWEL

81

1 department and that his father had Alzheimer's disease.

2 The head injuries, the substance abuse, the
3 accidents only were revealed, as I recall, once I asked him
4 questions that elicited them. Both questions were asked
5 relatively early in the interview, but they were in response
6 to questions.

7 Q Now, over the course of -- you reviewed a pretty
8 significant file in this case. He's been evaluated a number
9 of times; right?

10 A That is correct.

11 Q By a number of doctors?

12 A Yes.

13 Q And he's taken a lot of tests over that period; right?

14 A Yes.

15 Q And he's done a lot of interviews as well?

16 A Yes.

17 Q I don't know if you know this or not. Do you know --

18 MS. DOLAN: Objection.

19 THE COURT: Well, let's hear the question.

20 Q Do you know whether he's appeared in court?

21 THE COURT: You can answer that yes or no. Do you
22 know?

23 A Well, you told me --

24 THE COURT: Do you know?

25 THE WITNESS: He's appeared in court, yes.

DROB - CROSS / DOLAN

82

1 Q Now, is it possible for somebody -- just yes or no, is it
2 possible for somebody to learn through this process answers
3 that would lead a doctor to conclude one thing or another?

4 MS. DOLAN: Objection.

5 THE COURT: Calls for speculation. Sustained.

6 MS. DOLAN: The government --

7 THE COURT: Sustained. I sustain your objection.

8 MS. DOLAN: I object to those force orders. I want
9 that on the record.

10 MR. TROWEL: Nothing further, Your Honor. Thank
11 you.

12 THE COURT: Any questions?

13 MS. DOLAN: Briefly.

14 CROSS-EXAMINATION

15 BY MS. DOLAN:

16 Q Dr. Drob, the government just asked you about a bunch of
17 tests and validity measures. Did you adjust for validity in
18 this evaluation?

19 A I took the results of both my tests and the formal
20 validity tests into consideration, and in coming to my
21 ultimate conclusion I guess you could say adjusted for them.

22 Q And did you incorporate validity testing in some measure
23 in your evaluation?

24 A Yes.

25 Q And if I -- and then the government just asked you

DROB - CROSS / DOLAN

83

1 whether it's common practice to explain why you didn't conduct
2 further validity testing within the report.

3 A Yes.

4 Q Could I direct your attention to the bottom of page 17 of
5 your report and the top of page 18.

6 A Okay.

7 Q And did you there essentially explain why you did not
8 conduct further testing?

9 A Yes.

10 Q And if I could just direct your attention to the first
11 full paragraph there on page 18, could you put that paragraph
12 into layman's terms?

13 A I'm reviewing it. If you give me a moment. (Reviewing.)
14 Well, there are a number of things that are in that paragraph.
15 You want me to summarize them?

16 Q Yes, please.

17 A Well, he had -- these are transcripts of --

18 THE COURT: Whoa, whoa. Whenever one reads one
19 tends to speed up.

20 Q No, I'm talking about the first full paragraph right
21 above the -- starts with "overall."

22 A Oh, I'm sorry. (Reviewing.) Well, in layman's terms,
23 that my assessment is that, overall, if you look at all the
24 testing and all the evaluations that were done that the
25 defendant appears to be exhibiting a decline in his cognitive

DROB - CROSS / DOLAN

84

1 functioning.

2 While there are some indications, for example, on
3 the TOMM that he's exaggerating cognitive deficits on testing,
4 that these are not sufficiently probative or sufficient to
5 outweigh my conclusion that he is, in fact, declining
6 cognitively and certainly not for me to conclude that this
7 decline is a result of voluntary behavior on his part.

8 Q And the way that you express that conclusion or those
9 findings in the report, does that incorporate validity
10 measuring?

11 A Oh, it incorporates my review of mine and other's
12 validity measuring, yes.

13 MS. DOLAN: Nothing further.

14 THE COURT: Anything else?

15 MR. TROWEL: Not from the government, Your Honor.

16 THE COURT: Thank you, Doctor, I appreciate it. You
17 may step down.

18 THE WITNESS: Thank you.

19 THE COURT: Do you have another witness?

20 MR. TROWEL: We don't, Your Honor. We just have
21 some calls that I think we're going to introduce by
22 stipulation. There are some prison calls that I think we
23 would offer to the Court if we had the opportunity.

24 THE COURT: Have you spoken with Ms. Dolan about
25 that?

DROB - CROSS / DOLAN

85

1 MR. TROWEL: We did speak before the hearing, Your
2 Honor. I think she has an objection she'd like to preserve.

3 MS. DOLAN: I just would like to preserve an
4 objection if they're ever introduced at trial. I'd like to be
5 able to verify their authenticity and accuracy.

6 THE COURT: Well, is there any reason to take them
7 in now if you're not going to agree that they're accurate now?

8 MR. TROWEL: I think we're agreeing for the purposes
9 of the hearing that they're accurate and that Your Honor --

10 MS. DOLAN: I'm not objecting for the purposes of
11 this hearing.

12 THE COURT: I just want to be clear what you are
13 objecting and what you're reserving on for my friends on the
14 17th floor, who would ask me why I didn't make that clearer
15 for them. Okay.

16 MR. TROWEL: Your Honor, just for the record, they
17 are transcripts that are marked Government's Exhibit 12, 13,
18 14 and 15 and then a disk containing the phone calls
19 underlying those transcripts marked as Government Exhibit 16.

20 THE COURT: Any objection to those being admitted
21 for purposes of this hearing?

22 MS. DOLAN: Subject to the same understanding.

23 (Government Exhibits 12, 13, 14, 15 and 16 received
24 in evidence.)

25 THE COURT: All right. Do we have any other

SERGEANT M. BUMAGIN - DIRECT / DOLAN

86

1 witnesses?

2 MR. TROWEL: Not from the government.

3 MS. DOLAN: Yes. The defense calls Martin Bumagin.

4 THE COURT: Please come forward, sir, and be sworn.

5 (Witness sworn.)

6 THE COURT: Thank you. Please be seated, sir.

7 Thank you. I'm going to ask you to state and spell your name
8 and speak into this microphone. That way everyone will be
9 able to hear you. All right? The microphone right in front
10 of you. What is your name and please spell it, sir.

11 THE WITNESS: Sergeant Martin Bumagin, M-a-r-t-i-n
12 B-u-m-a-g-i-n.

13 THE COURT: All right. You may inquire, Counsel.

14 MS. DOLAN: Thank you.

15 **SERGEANT MARTIN BUMAGIN,**

16 Called by the Defense, having been first duly sworn, was
17 examined and testified as follows:

18 DIRECT EXAMINATION

19 BY MS. DOLAN:

20 Q Mr. Bumagin -- well, if I can just call you Martin so
21 that we don't have any confusion. Mr. Bumagin will refer to
22 Semyon Bumagin, my client.

23 THE COURT: That's fine. You can call him Sergeant
24 since he introduced himself that way and there's no jury here.
25 If Sergeant works, that works for me. Does that work for you,

SERGEANT M. BUMAGIN - DIRECT / DOLAN

87

1 sir?

2 THE WITNESS: Yes, Your Honor.

3 THE COURT: Thank you. So Sergeant it will be.

4 Q Sergeant, are you currently employed?

5 A No.

6 Q And have you previously been employed?

7 A Yes.

8 Q And when were you most recently employed?

9 A September 24th, 2012.

10 Q And where were you employed?

11 A I was in the Wounded Warrior Unit at West Point,
12 recovering from my tour of duty.

13 Q And where was your tour of duty?

14 A In Iraq.

15 THE COURT: Sir, I'm going to ask you -- see this
16 microphone in front of you, sir? Just pull it a little closer
17 to you, it will move, and that way we can hear you better.
18 Okay?

19 THE WITNESS: Yes, Your Honor.

20 THE COURT: Thank you. Please continue.

21 Q And how long were you in Iraq?

22 A For about a year.

23 Q And where were you prior to that?

24 A I was attached to the 69th Infantry Battalion here in New
25 York.

SERGEANT M. BUMAGIN - DIRECT / DOLAN

88

1 Q And during the general period between about 2007 to the
2 present, have you been in New York most of that time?

3 A Yes.

4 Q Basically, what years have you been in New York?

5 A I was released from the U.S. Marines in 2008, and since
6 that time I was attached to the -- to the Reserve component.
7 So I spent a lot of time in New York. I had intermediate time
8 where I was activated for training and then the rest of the
9 time I was in New York.

10 Q Okay. And other than that tour of duty, you were in New
11 York for the balance of the time?

12 A And also I was with my father in Florida.

13 Q And when were you with your father in Florida?

14 A That was I believe 2008 till about 2009.

15 Q And just so the record is clear, your father is who?

16 A My father is Semyon Bumagin.

17 Q Who is in this courtroom?

18 A Yes, ma'am.

19 Q Now, are you currently in school or studying?

20 A Yes, ma'am.

21 Q And what are you studying?

22 A I'm studying biology and prerequisite courses to go to
23 medical school.

24 Q Now, have you maintained a relationship with your father
25 throughout your life?

SERGEANT M. BUMAGIN - DIRECT / DOLAN

89

1 A Yes, ma'am.

2 Q And did there ever come a time when you began to notice a
3 decline in his memory or his cognitive function?

4 A Yes, ma'am.

5 Q And about when was that?

6 A That was in the time period starting around 2009.

7 Q And what did you notice?

8 A I noticed that he was very forgetful. I noticed that he
9 couldn't accomplish tasks or remember to accomplish tasks. He
10 would constantly lose his -- lose his keys. He would lose the
11 car. He would forget where he would park the car. There's an
12 enormous record of parking tickets in the DMV, an enormous
13 record. That it just -- I felt like I was -- I felt like I
14 was losing my father, because I was losing him mentally. I
15 wasn't able -- I'm sorry, it's difficult for me to find the
16 words.

17 Q And how did you know there were parking tickets?

18 A They would come to the home of record, which was 2930
19 West Fifth Street, and him and my mother would argue about it
20 frequently. And he just couldn't remember where he was
21 parking the car and where he left the car. He would walk
22 around searching in a panic for the car and this sort of
23 behavior.

24 Q And, again, about which year did this behavior begin?

25 A This was in two thousand -- 2009, and already a little

SERGEANT M. BUMAGIN - DIRECT / DOLAN

90

1 bit earlier I started to see signs.

2 Q You mentioned that you were in Florida with your father
3 at some point?

4 A Yes.

5 Q And when exactly was that?

6 A That was starting in 2008, and I started noticing
7 cognitive impairment. And my father also suffers from severe
8 depression and I believe that he self-medicates with drugs.

9 Q Now, did you notice any effects of memory issues while
10 you were with your father in Florida in 2008?

11 A Yes, ma'am, I did.

12 Q And can you give those examples or an example?

13 A We were working in a restaurant. We had a small
14 partnership. We had a partnership in a restaurant. We were
15 working in the restaurant. And he would be asked to get stuff
16 from Restaurant Depot and he would not be able to remember
17 what he had to get. He would not be able to find his way.

18 And it came to the point even where we had a
19 navigation system that was set up for the home, meaning the
20 home, our home in New York, and he got into the car and he
21 didn't know how to get home to where we were living in
22 Florida. So he pressed "home" and he just started driving
23 basically to New York for hours.

24 So that was like a real red flag, because he
25 doesn't -- he was yelling at the navigation system. And just

SERGEANT M. BUMAGIN - DIRECT / DOLAN

91

1 can you imagine a person just driving for hours in Florida but
2 thinking he's driving home in Florida but he's following the
3 navigation to New York because he doesn't realize what's going
4 on.

5 Q Now, when were you deployed?

6 A I was last deployed in 2010 to 2011.

7 Q And was your father aware of your deployment at the time?

8 A I felt that -- I felt that he was aware, but he didn't
9 really understand what was going on with me. And after the
10 deployment when I was in the hospital in the Wounded Warriors
11 Unit, he really couldn't understand what happened or what's
12 going on with me. And I would often plead with him to please
13 go to see a psychiatrist. And it took a tremendous -- it took
14 a tremendous emotional toll on me. It causes me a lot of
15 emotional pain.

16 Q Well, when you say that he didn't understand, could you
17 explain what you mean by that?

18 A He didn't understand that I was wounded. He didn't
19 understand that I was in the Wounded Warrior Unit. He didn't
20 understand -- he didn't even understand that I'm in the
21 hospital, I'm in the Wounded Warrior Unit at West Point. He
22 doesn't know where I was. He does not know -- he does not
23 know where I was. He does not know that I demobilized. He
24 does not know what I was doing. He just doesn't know
25 everything that I've been through.

SERGEANT M. BUMAGIN - DIRECT / DOLAN

92

1 Q Was your deployment notable in any way?

2 A Yes, it was notable. I -- I was attacked and a shell
3 landed next to me and it didn't detonate, and I spilled the
4 Gatorade -- it was an old Soviet shell. I spilled the
5 Gatorade out of my bottle and I put the sand inside the bottle
6 to keep it for the rest of my life, because I felt that I
7 was -- that God saved me.

8 And it had a really dramatic impact on me because I
9 faced death multiple times. I was attacked multiple times. I
10 deployed in 2004-2005 as a U.S. Marine, a part of the 33rd
11 Marine Expeditionary Unit to Anbar Province, to Fallujah, in
12 support of Operation Phantom Fury, and it was a very bloody
13 time.

14 Q Now, did you share experiences with your father at any
15 point?

16 A Yes. Yes, ma'am, I did.

17 Q And did he appear to retain that information?

18 A No, ma'am. He doesn't appear to retain any information.
19 He probably would not be able to recall --

20 Q Well, I don't want you to speculate. Just if you could
21 confine your answer to what you observed.

22 A Yes, ma'am. He does not retain information.

23 Q And those life-altering events -- well, the events that
24 you described, did he retain those?

25 A Negative.

SERGEANT M. BUMAGIN - DIRECT / DOLAN

93

1 Q Memories?

2 A Negative.

3 Q And you said you were deployed in Phantom Fury Operation?

4 A Operation Phantom Fury, ma'am.

5 Q And was that a big deal, little deal, not --

6 A It was a big deal for the entire country. It was the
7 first time that Marines have conducted house-to-house fighting
8 since Hue City in Vietnam.

9 Q And is that operation something that, as a matter of
10 normal course, the parents of a Marine would recollect?

11 A Absolutely, ma'am.

12 Q And did your father appear to recollect it?

13 A Negative.

14 Q And, again, which year was that?

15 A 2004-2005.

16 Q Are you aware of any drug problems that your father
17 suffered?

18 A Affirmative. Yes, ma'am.

19 Q And can you just describe those?

20 A I believe that my father abused marijuana, crack and
21 heroin.

22 Q And how did you come to that belief?

23 A When I came back home, there were people around the
24 neighborhood that would come up to me, random people. Some of
25 them were my friends. And they said, oh, we saw your dad,

SERGEANT M. BUMAGIN - DIRECT / DOLAN

94

1 he's not doing well, seems really depressed. He was -- he was
2 on drugs. He's really high. He seems like -- they would say
3 like I'm worried that he can overdose and he doesn't know
4 what's going on with it and he's in really, really bad shape.

5 Q Did you ever see him when he was high?

6 A He would be ashamed. He would be ashamed to be high in
7 front of me, but I did notice drug paraphernalia. When I went
8 to my grandmother's house, I noticed that.

9 Q And how often did you see your father during this period?

10 A For me and my father, we had a few years that I saw him.
11 And when we lost the restaurant, when we lost the business and
12 he fell on hard times and he really didn't have any money, he
13 would ask my mom for \$20. And my mom would feel bad and she
14 would give it to him, and then she would say that -- she would
15 hear in his voice that he was getting high with the last
16 money. It was just a very sad and desperate situation.

17 Q Well, just to return to the question, about how
18 frequently did you see him over this period of time?

19 A I would stop -- I would see him maybe -- I can't recall
20 exactly how frequent. There was no set pattern of time that I
21 would see him. I did not see him on a daily basis, because I
22 had a lot of things going on in my life, but when I would come
23 home for a period of time I would stop by. I would visit him.
24 I would see him.

25 And let's say in a matter of two weeks, if I would

SERGEANT M. BUMAGIN - DIRECT / DOLAN

95

1 come to my grandmother's house four times, I would see -- I
2 would talk to him and I would say -- I would actually ask him
3 to leave my mother's house and live with my grandmother,
4 because of the amount of stress that my mother was getting
5 from his alcohol abuse and drug abuse, because he really
6 suffered from alcoholism.

7 So in order to protect my mother, like I didn't want
8 her to see him like this. I didn't want her to see him so
9 depressed and I didn't want him to -- I didn't want him to --
10 I didn't want my family to be suffering like this and I wanted
11 him to get help.

12 But he was unable to recognize that he really needed
13 help, so he was trying to self-medicate, because I can't
14 really -- it was hard for me to -- I would say like I really
15 want you to go see a psychiatrist. I said that many times to
16 him. But he's a person that doesn't feel -- doesn't believe
17 that psychiatrists could help him. That's just....

18 Q Did he recollect those conversations that you had with
19 him each time you had them?

20 A Are you asking me if he would remember --

21 Q Did he appear to remember the conversations that you had
22 about this topic with him from time to time?

23 A I don't believe that he even remembered that I -- I would
24 call him, even I would call him when I was overseas and when I
25 demobilized, I would call him and I would say, Pa, you got

SERGEANT M. BUMAGIN - DIRECT / DOLAN

96

1 to -- you are suffering from depression, maybe you need to get
2 antidepressants so you can stop drinking and abusing drugs.
3 And then I would call him again, and I don't believe that he
4 remembered that we had that conversation.

5 Q On those instances, did he always know where you were?

6 A No, ma'am.

7 Q Did your father ever engage in a change in behavior in
8 public?

9 A Yes. In public, he would -- he would -- he cannot -- he
10 cannot go a period of time without urinating, so he would
11 urinate in public. He would have to stop the car. He would
12 have to stop the car and he would urinate.

13 Q And did he always do that?

14 A No, not -- throughout my entire life he didn't do that
15 until later on, until later on in life when I believe he was
16 suffering -- his body was suffering. His entire body was
17 suffering.

18 Q About when did that start happening, do you remember what
19 year?

20 A That started happening around after 2008-2009, that's
21 when --

22 Q So subsequent to Florida, in those months?

23 A Yes. It was -- yes, ma'am.

24 Q Now, do you still talk to your father?

25 A Yes, ma'am.

SERGEANT M. BUMAGIN - DIRECT / DOLAN

97

1 Q How often?

2 A Very often. Almost every day.

3 Q And you speak to him in jail? He's in jail; correct?

4 A Yes.

5 Q Do you notice him forgetting any information from
6 conversation to conversation?

7 A Yes, ma'am. He actually even forgets that we speak.
8 When the conversation starts, he says, thank God, there's a
9 God, I was able to get through to you. And I said, Pa, I just
10 told you an hour ago that I have a final exam and I'm in
11 school and I can't pick up the phone. I just told you this,
12 please don't call me because I have to be in class and I have
13 to study for my exam, and I just told you this an hour ago.

14 And I'm like, you have to write it down. You have
15 to take a piece of paper with you and start writing things
16 down on paper because it's going to destroy me. I can't -- it
17 really has a terrible effect on me emotionally that he cannot
18 remember that and he calls me in an hour. And then I'll just
19 say, Pa, it's destroying me emotionally that you can't
20 remember this. I have to focus on this exam. And then an
21 hour will pass, he'll call me like nothing happened, like
22 completely nothing happened. He doesn't remember that we had
23 that conversation.

24 Q Does he appear to remember what you study from
25 conversation to conversation?

SERGEANT M. BUMAGIN - DIRECT / DOLAN

98

1 A It doesn't -- he doesn't appear -- he doesn't appear to
2 remember that I'm in school. Even though I tell him I have
3 school from this hour to this hour to this hour and don't call
4 me at this hour, he doesn't even remember that I have school.

5 Q And are you married?

6 A Yes.

7 Q And you have a wife?

8 A Yes, ma'am.

9 Q And does your father forget anything about her?

10 A Yes, ma'am. He forgets -- he forgets -- he cannot
11 remember what her parents' names are. He doesn't remember
12 that he met her parents. He doesn't remember that she does
13 not speak Russian. Every single time that he calls, he
14 says -- I say, oh, she's right next to me. He starts talking
15 to her in Russian. I'm like, Pa, again, how many times do I
16 have to tell you, my wife is not Russian. She doesn't speak
17 Russian.

18 Q And how long have you been together?

19 A We've been together for a long time. We've been together
20 for four years.

21 Q Does he remember your age?

22 A I don't believe he remembers my age right now.

23 Q Well, have you had conversations with him where he seems
24 to have forgotten your age?

25 A He forgets my age. He forgets my sister's age. He

SERGEANT M. BUMAGIN - DIRECT / DOLAN

99

1 forgets that she graduated from Columbia. He forgets that he
2 wasn't at the graduation. He probably can't remember what
3 school I graduated from. He can't remember what high school I
4 graduated from. He doesn't remember that.

5 Q And where did your sister graduate from?

6 A She graduated from Columbia.

7 Q And was that a momentous moment in the family?

8 A We were all very proud of her. We were all extremely
9 proud of her. She worked very hard, and he can't remember --
10 he doesn't know what profession she has.

11 Q And do you know whether your father has any previous
12 convictions?

13 A Yes.

14 Q And have you had any conversations about those
15 convictions with him?

16 A Yes. Over the phone, he actually called me and he told
17 me -- I received a phone call from him and I even received a
18 phone call from another inmate and they said, come pick up
19 your father, he's getting out of here on Monday. I had a
20 couple of phone calls like this. Oh, come pick up your
21 father, he's getting out on Monday. And he said, the
22 honorable judge -- the honorable judge released me, come pick
23 me up, bring me a sweat suit. He's like, I knew this would
24 happen. And he's like, the honorable judge released me, bring
25 me a sweat suit.

SERGEANT M. BUMAGIN - DIRECT / DOLAN

100

1 And I didn't -- I kind of lost it at that point and
2 I called -- I called the prison and -- I called the Bureau of
3 Prisons and I said -- an officer picked up. I said, I'm -- I
4 said, can you please help me, I'm a veteran and my father just
5 called me and he said to come pick him up and it's
6 unbelievable because nobody told me anything that's happening.
7 They didn't tell me he's being released and he told me to come
8 pick him up on Monday.

9 And the person that picked up the phone, he said,
10 oh, he also served in the military, so he went to the computer
11 and he's like, don't worry, I'll check in the computer. He
12 checked in the computer and he said, the release date, he
13 said, for your father's release date it says unknown in the
14 computer. And he's like, trust me, your father is not being
15 released, because we would see it in the computer.

16 Q Has your father discussed his case with you over the
17 telephone at MDC?

18 A He just says stuff like when he goes to court -- when he
19 -- he thinks -- he calls it Crucifixion Day. He says
20 Crucifixion Day is coming up and stuff like that. And he
21 said, just pray for me, because I believe the honorable judge
22 can let me go and stuff like that. Just for me to pray for
23 him. And he says he's praying day and night.

24 Q And has he ever discussed his memory condition with you
25 over the phone?

SERGEANT M. BUMAGIN - DIRECT / DOLAN

101

1 A He has discussed his memory condition, because he also
2 thinks that he wasn't convicted before. He thinks that -- and
3 when I told him that he spent a significant amount of time in
4 prison, he's shocked. He's like, no, I never spent that
5 amount of time in prison. There's many phone calls where he's
6 like, what, I never had any convictions before. And I'm like,
7 no, you were in prison for a long time. He's like, no, what
8 are you talking about? He's like -- he's telling me I have
9 Alzheimer's.

10 Q Has he ever asked you to fabricate any information?

11 A Negative.

12 Q Has he ever asked you to make anything up --

13 A Negative.

14 Q -- for your testimony today?

15 A Negative.

16 Q Or anything in relation to this case?

17 A Negative.

18 MS. DOLAN: Nothing further.

19 THE COURT: Your witness.

20 MR. TROWEL: Nothing from the government, Your
21 Honor. Thank you.

22 THE COURT: Sergeant, you may step down and thank
23 you for your service to the country.

24 THE WITNESS: Thank you, Your Honor. Thank you for
25 your service.

USA v Bumagin

102

1 THE COURT: Thank you. Any other witnesses?

2 MS. DOLAN: Not from the defense, Your Honor.

3 THE COURT: Any other witnesses?

4 MR. TROWEL: Not from the government, Your Honor.

5 THE COURT: All right. I'm going to reserve
6 decision. I'm going to ask the lawyers do you wish to have
7 any additional time for briefing in light of today's hearing?

8 MR. TROWEL: I would, Your Honor. I could submit
9 something in a week or ten days, I think, but....

10 MS. DOLAN: I oppose any further protraction of
11 these proceedings.

12 THE COURT: You don't wish to submit anything?

13 MS. DOLAN: I'll have a look at Mr. Trowel's papers.
14 The defense has argued these issues into the ground. I feel
15 that my perspective and that the defense position was
16 adequately made months and months ago, so I don't anticipate
17 that I have anything further to submit. I oppose any further
18 delay and that's my position.

19 THE COURT: All right. I'll give you one week for
20 any additional submission, one week from today on ECF; and,
21 Ms. Dolan, you will have one week beyond that to respond to
22 any submission from the government on ECF; and I will then
23 render my decision promptly thereafter.

24 Is there anything else?

25 MR. TROWEL: Not from the government, Your Honor.

1 MS. DOLAN: Not from the defense. Thank you.

2 THE COURT: Thank you. All right. We're adjourned.

3 (Whereupon, the proceedings were adjourned.)

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WITNESS

FOR THE GOVERNMENT

SANFORD DROB 7

DIRECT EXAMINATION 7

BY MR. TROWEL

CROSS-EXAMINATION 82

BY MS. DOLAN

FOR THE DEFENSE 86

SERGEANT MARTIN BUMAGIN

DIRECT EXAMINATION 86

BY MS. DOLAN

EXHIBIT

FOR GOVERNMENT

Government Exhibit 11 10

Government Exhibits 12, 13, 14, 15 and 16 85